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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. 384**

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**HOWARD E. BREISCH, PETITIONER,**

**vs.**

**CENTRAL RAILROAD OF NEW JERSEY**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT**

---

**PETITION FOR CERTIORARI FILED AUGUST 29, 1940.**

**CERTIORARI GRANTED OCTOBER 21, 1940.**

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INDEX.

	Page
Record from D. C. U. S., Eastern District of Pennsylvania.....	1
Docket entries .....	1
Complaint .....	3
Affidavit of defense .....	6
Statement of evidence .....	11
Caption and appearances .....	11
Plaintiff's evidence:	
Testimony of Howard E. Breisch .....	11
Defendant's motion for directed verdict.....	51
Defendant's evidence:	
Testimony of Oscar Koehler .....	53
Fred H. Pagel .....	66
Earl T. Kramer.....	71
Earl A. Zeigler .....	73
Colloquy.....	77
Motion to dismiss .....	82
Motion for directed verdict .....	82
Charge of the court .....	84
Defendant's points .....	95
Verdict .....	95
Stipulation as to verdict, etc. ....	95

## Record from D. C. U. S., Eastern District of Pennsylvania—Continued

	Page
Stipulation as to testimony .....	96
Judgment .....	97
Defendant's motion for judgment .....	98
Opinion, Dickinson, J. ....	99
Decree; exception .....	104
Notice of appeal to the Circuit Court of Appeals for the Third Circuit .....	105
Statement of points to be relied upon on appeal .....	106
Extension of time for filing record .....	107
Stipulation as to contents of record .....	108
Clerk's certificate .....	109
Proceedings in U. S. C. C. A., Third Circuit .....	110
Minute entry of hearing .....	110
Opinion, Biggs, J. ....	110
Dissenting opinion, Jones, J. ....	117
Judgment .....	125
Clerk's certificate .....	125
Order allowing certiorari .....	126



*Docket Entries*

1

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 129

HOWARD E. BREISCH

vs.

CENTRAL RAILROAD OF NEW JERSEY

I.

DOCKET ENTRIES

December 29, 1938. Complaint filed.

December 29, 1938. Summons exit.

January 6, 1939. Appearance of Aubrey & Friedman,  
Esqs., for Defendant filed.

January 20, 1939. Summons returned: "on Jan. 3, 1939,  
served" and filed.

February 2, 1939. Affidavit of defense filed.

February 14, 1939. Plaintiff's demand for jury trial filed.

Served February 7, 1939.

February 14, 1939. Praecept to place case on trial list filed.

April 26, 1939. Jury called and sworn.

April 26, 1939. Trial witnesses sworn.

April 27, 1939. Trial resumed.

April 27, 1939. Verdict for Plaintiff in \$12,000.

April 27, 1939. Judgment in favor of plaintiff in \$12,000  
filed. 4-22-39 Noted and Notice mailed.

May 3, 1939. Defendant's motion for judgment on point  
of law reserved, filed.

May 18, 1939. Testimony filed.

May 19, 1939. Argued sur defendant's motion for judgment.

June 8, 1939. Opinion, Dickinson, J., denying motion for judgment *o. o. v.* and for a new trial filed.

July 11, 1939. Defendant's notice of appeal filed. Copy to F. B. Gerner as to D. Getz.

July 11, 1939. Bond for costs sur appeal in \$250., with U. S. Fidelity & Guaranty Co., surety filed.

July 11, 1939. Copy of Notice to U. S. Circuit Court of Appeals, filed.

Aug. 16, 1939. Stipulation of counsel extending time for filing record on appeal filed.

Sept. 23, 1939. Statement of points to be relied upon on appeal filed.

Sept. 23, 1939. Stipulation of counsel as to certain omissions in record filed.

Sept. 23, 1939. Stipulation of counsel as to contents of record filed.

Oct. 9, 1939. Transcript of record transmitted to U. S. Circuit Court of Appeals.

Oct. 10, 1939. Stipulation of counsel as to omissions from printed record filed.

II.  
COMPLAINT

(Filed Dec. 29, 1938)

1. The plaintiff is a citizen of the State of Pennsylvania, residing at Coopersburg, Route 1, Pennsylvania, and the defendant is a corporation incorporated under the laws of the State of New Jersey.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

3. During all the times herein mentioned, defendant owned and operated in interstate commerce, a Railroad which runs through and serves various industrial plants located in the City of Allentown, County of Lehigh, State of Pennsylvania.

4. On and for some time prior to the 31st day of December, 1936, the defendant maintained and provided an engine crew consisting of a conductor, engineer, fireman, and brakeman for the purpose of making daily movements of certain freight cars, both loaded and empty, on the property of the American Steel and Wire Company, a company operating a wire mill located in the City of Allentown, aforesaid.

5. The plaintiff who has been in the employ of the defendant company for a period upwards of twenty-six years, was a member of the crew employed by the Central Railroad of New Jersey, for the purpose of operating in the yard of the American Steel and Wire Company, and was on this particular day assigned to the said crew as an extra conductor.

*Complaint*

6. On or about, the 31st day of December, 1936, the crew to which plaintiff had been assigned while in the act of shifting freight cars in the yard of the American Steel and Wire Company at Allentown, Pennsylvania, negligently caused a loaded freight car to run away from its engine.

7. The Plaintiff, in the course of his duties, boarded the run-away car and attempted to apply the hand brake of the said run-away freight car in order to prevent a collision with another freight car standing on the same tracks. Plaintiff made every effort to apply the hand-brake which brake failed to respond, causing the run-away car to run into another standing freight car, thereupon causing the said run-away freight car to rebound backward and forward again, thereby crushing the plaintiff's right foot.

8. The defendant Railroad Company, contrary to the provisions of the Safety Appliance Act, failed to provide, and permitted the plaintiff, its employee, to handle a freight car which was not equipped with certain required safe and secure appliances, particularly of a defective hand brake on the said freight car.

9. By reason of defendant's negligently operating its freight cars, and by reason of the defendant's further negligence in permitting plaintiff to operate and work on freight cars with defective brakes, coupling, and other faulty equipment, the plaintiff, while in the employ of the defendant company, sustained serious injuries, particularly to his right foot, which was so badly crushed that the said foot of the plaintiff had to be amputated, and subsequently, an additional part of plaintiff's right leg had to be amputated.

10. Prior to these injuries plaintiff was a strong, able-bodied man, capable of earning and actually earning



fifty dollars a week. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of \$500.00 for medicine, medical attendance, and hospitalization, and will be obliged to continue to expend large sums for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of \$75,500.00, and costs.

(s) FRED B. GERNERD,  
502 Hamilton St.,  
Allentown, Pa.

(s) DAVID GETZ,  
*Attorneys for Plaintiff.*

DAVID GETZ,  
Colonial Building,  
Allentown, Penna.



## III.

## AFFIDAVIT OF DEFENSE

(Filed Feb. 2, 1939)

The defendant, The Central Railroad Company of New Jersey (herein sued as Central Railroad of New Jersey), through its attorneys, Aubrey & Friedman, Esqs., hereby makes answer to Plaintiff's Complaint in the above cause of action as follows:

## 1. Admitted.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

3. Denied. Defendant admits that at the times mentioned in the Complaint it owned and operated a railroad which runs through and serves various industrial plants located in the City of Allentown, County of Lehigh and Commonwealth of Pennsylvania, but denies that during all the times mentioned in the Complaint the same was operated in interstate commerce.

## 4. Admitted.

## 5. Admitted.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment in paragraph 6 of the Complaint.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment in paragraph 7 of the Complaint. Defendant further

*Affidavit of Defense*

7

avers, upon information and belief, that the injuries alleged to be sustained by the plaintiff were caused in whole or in part, or were contributed to by the negligence or want of care on the part of the plaintiff and not by the fault, negligence or want of care on the part of the defendant, and further, that they were the result of obvious risks of his employment which the plaintiff assumed.

8. Defendant denies the facts set forth in paragraph 8 of the Complaint. Defendant further avers, upon information and belief, that the freight car handled by plaintiff was fully and properly equipped with safety and security appliances in conformity with the Safety Appliance Act and that the hand brake on the said freight car was in good order at the time of the accident.

9. Defendant denies the facts set forth in paragraph 9 of the Complaint and avers that the injuries mentioned in the Complaint were the result of obvious risks of employment which the plaintiff assumed and, moreover, were caused in whole or in part, or were contributed to by the negligence or want of care on the part of the defendant and not by any negligence or fault or want of care on the part of the defendant.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment that prior to these injuries plaintiff was a strong, able bodied man, capable of actually earning \$50. a week and by reason of these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of \$500. for medicine, medical attendance, and hospitalization, and will be obliged to continue to expend large sums for medicine, medical attendance, and hospitalization.

11. As a further defense to the Complaint, defendant avers that at the time plaintiff was injured, his work con-

sisted solely of the handling of cars containing no interstate shipments and moving wholly within the Commonwealth of Pennsylvania, and that at that time and in this connection neither the plaintiff nor the defendant were engaged in interstate commerce.

12. Defendant further avers that at all times mentioned in the Complaint, as well as at the time of the commencement of this action, there was in full force and effect in the Commonwealth of Pennsylvania a certain public act or statute known as the "Workmen's Compensation Act of 1915" and its amendments, which provided for an elective system of compensation for personal injuries, or for the death of an employee caused by an accident arising in the course of his employment, to be administered and enforced by a tribunal in said act established and known as the Bureau of Workmen's Compensation.

13. Defendant further avers, upon information and belief, that no statement in writing from either the plaintiff to the defendant or from the defendant to the plaintiff that the provisions of the said Workmen's Compensation Act of 1915 were not intended to apply was ever made nor was a copy of such a statement ever filed with the said Bureau of Workmen's Compensation, as required by Article III, Section 302 (a) of the said Act, and therefore, both the plaintiff and defendant had accepted the compensation provisions of said Act and both the plaintiff and this defendant were bound thereby at the time of the happening of the accident mentioned in the Complaint; and the defendant, prior to the time of the injury to the plaintiff mentioned in the Complaint herein, had duly complied with the provisions of the said Workmen's Compensation Act of 1915 and had furnished satisfactory proof to the Bureau of Workmen's Compensation of its financial ability to pay such compensation for itself.

14. Defendant further avers that the sole measure of

liability for the injuries mentioned in the Complaint is that prescribed by the said Pennsylvania Workmen's Compensation Act of 1915, and its amendments, and that plaintiff has no remedy, at common law, or under the Federal Employer's Liability Act, or the Federal Safety Appliance Act, or otherwise enforceable in this Court for the injuries mentioned in the Complaint, and that therefore this Court has no jurisdiction of the subject matter of this action.

Wherefore, defendant prays that judgment may be entered against the plaintiff and for the defendant, together with the costs of this suit.

AUBREY & FRIEDMAN,

By: (s) G. W. AUBREY,

*Attorneys for Defendant,*

605 Commonwealth Building,  
Allentown, Pennsylvania.

*State of New York,*

*County of New York ss:*

Wm. Kohler, being duly sworn, deposes and says: That he is Secretary and Treasurer of The Central Railroad Company of New Jersey, the defendant in the within action; that he has read the foregoing Affidavit of Defense and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further says that this verification is made by him and not by defendant for the reason that said defendant is a foreign corporation; and that the sources of his information and the grounds of his belief are statements and reports made to him by other officers and employees of said defendant corporation,

(s) WM. KOHLER.

*Affidavit of Defense*

Sworn to and subscribed before me this 28th day of  
January, 1939.

(Notarial Seal)

(s) GROVER C. MILLER,

*Notary Public,*

New York County Clerk's No.

174, Register's No. O. M. 212.

Commission Expires March 30th, 1940.



IV.

TESTIMONY

(Filed May 18, 1939)

*Before:*

Hon. Oliver B. Dickinson, J., and a Jury

Philadelphia, Pa., April 26, 1939

*Present:*

Fred B. Gerner, Esq., and David Getz, Esq., representing the Plaintiff.

Henry B. Friedman, Esq., representing the Defendant.

Jury impaneled and sworn or affirmed April 26, 1939.

TRANSCRIPT OF THE TRIAL RECORD

PLAINTIFF'S EVIDENCE

HOWARD E. BREISCH, having been duly sworn, was examined and testified as follows:

*Direct Examination*

MR. GERNERD: If the Court please, I will have to speak a little loud, because this witness is dull of hearing, so that Your Honor may know,—

THE COURT: I noticed that, and you will recall as an accompaniment to that affliction that a man often speaks very low himself,—

MR. GERNERD: That is correct.

THE COURT: —so make clear to him he is to keep his voice up so all the jury can hear him.

BY MR. GERNERD:

Q. Mr. Breisch, when you speak, speak loud, so that this jury will hear every word that you utter, as well as the Court. What is your name?

A. Howard E. Breisch.

Q. And where do you live?

A. Coopersburg, route 1.

Q. Where is Coopersburg?

A. That is about eight miles from Allentown.

Q. Yes, and what was your employment prior to the 31st of December, 1936?

A. Regular extra conductor for the Central Railroad of New Jersey.

Q. How long were you employed by the Central Railroad of New Jersey prior to that date?

A. Since 1910, about twenty-six years.

Q. About twenty-six years. How long have you been a railroader?

A. Oh, about thirty-nine years.

Q. Thirty-nine years?

A. All told; mostly conductor.

Q. Mostly—

A. Conductor.

Q. Conductor?

A. Yes.

Q. Was this all passenger crews or freight crews?

A. Freight crews.

Q. Freight crews. Do you recall the morning of the 31st of December, 1936?

A. Yes, sir.

Q. Will you kindly tell His Honor and this jury just exactly what you did that morning?

A. On December 31st, 1936 I was called to conduct a drill engine at the American Steel and Wire Company, at Allentown, and 7 A. M.

Q. Now, wait, Mr. Breisch, what do you mean by a drill engine?

A. Well—

Q. Or drill crew.

A. A drill engine is an engine that shifts around cars, spots cars for loading and re-loading, classifies cars for trains.

Q. All right, go ahead.

A. I was called for 7 A. M. in the morning. I arrived at the wire mill maybe about five minutes of seven. I stopped at this scale shanty, or also the yard master's shanty office, to inquire what was going on. He wasn't there, so I walked in the trainman's shanty and looked around to see what I could do, and I found a slip of paper with some work on there, so I took the slip—

Q. Pardon me, where did you find this slip?

A. On the desk in the shanty.

Q. Shanty of what?

A. In the trainman's shanty.

Q. Oh, the trainman's shanty.

A. And I walked out, and the yard master still wasn't in his office, so I searched for the crew, and they come east from the south end of the building, they were just coming down from the south side of the building, and I jumped on the step, and I asked the fireman where he was going, and he said on the scale track, so I knowed that the—that the crew somehow or another knew what was going on without me telling them, although I was on—I was on—I was going to tell them to come in on the scale, because that was the first job on this slip.

Q. Now, what was on this slip?

A. Well, the first—

MR. FRIEDMAN: Now, wait a minute, if the Court please, that is objected to as being incompetent. The slip would be the best evidence.

THE COURT: The which?

MR. FRIEDMAN: The slip would be the best evidence.

THE COURT: What do you mean by the slip?

MR. FRIEDMAN: I understand he is testifying about some paper or document.

MR. GERNERD: If Your Honor please,—

THE WITNESS: Well, the work was on the paper, this job that I was—

THE COURT: Just a moment.

MR. GERNERD: Just a moment. When he reported—

THE COURT: Well, is he proposing to tell us what was on the paper?

MR. GERNERD: Yes, sir.

THE COURT: Well, the objection is the paper is the best evidence.

MR. GERNERD: We will now explain what happened, I am going to ask him what happened to that paper.

THE COURT: Now, you may lay the ground to introduce secondary evidence, of course.

BY MR. GERNERD:

Q. That slip contained what, that writing?

A. Some drill work, shifting work.

Q. You mean it had upon that what you were to do—

A. Yes, sir.

Q. —as conductor that morning?

A. Yes, sir, partly, part of that morning.

Q. Yes, and what became of that slip?

A. Well, I don't know, I had it in my hand, to get the light weight and the capacity of the car, and put on behind the number of the car, when she come in on the

scale. Of course when I seen this car break loose I made for the car. Now, whether I put it alongside, in my pocket, or lost it, I never had it on my person after that, I never found it, unless it was lost in the hospital somewhere when they undressed me, I don't know.

Q. In other words, that slip that you got in this house, the trainman's house, you don't know what became of it?

A. No, sir.

Q. It is lost?

A. Lost.

Q. Did you make a search for it?

A. Well, not particularly, I had nothing to search for but my overalls at home, and, of course, I never—I never searched for it because I—

THE COURT: Well, is he able to produce it?

BY MR. GERNERD:

Q. Are you able to produce—

A. No, sir.

Q. —that slip?

A. No, sir, no, sir.

Q. What was on that slip, if you recall?

A. Well, the first was to get a car off of the scale, that is on the dead rail of the scale and put it on the scale to weigh it, a car of scrap, commercial gondola with scrap, and weigh it.

MR. FRIEDMAN: Just a minute, now, if the Court please, at this time we make a further objection to this testimony as being irrelevant, and, also, there is nothing to show that this slip was given by any proper authority on behalf of the railroad, and I think we can clear that up if we interrogate the witness.

THE COURT: Well, you have the right to cross-examine on the question of his ability to produce it.



MR. FRIEDMAN: Not only to produce, I am not only raising my objection now to the production of the slip, but to the relevancy.

THE COURT: Well, I understand—

MR. FRIEDMAN: I don't believe this was a slip of the Central Railroad.

THE COURT: As I understand, these were simply written orders, weren't they?

MR. FRIEDMAN: By whom?

THE COURT: I would like to know by whom.

MR. FRIEDMAN: Well,—

THE WITNESS: I don't know, by somebody—

BY THE COURT:

Q. Well, but you received it as your orders, did you?

A. Yes, sir; that is what I took it for, my orders.

Q. You took it for your orders.

THE COURT: All right.

MR. FRIEDMAN: Now, may I ask the witness, then, from whom he got this slip,—

THE COURT: You may ask him, yes.

MR. FRIEDMAN: —before we go into it?

THE WITNESS: It was on the desk. I don't know who put it there. It was on there.

BY MR. GERNERD:

Q. What desk?

A. In the shanty, in the trainman's shanty.

BY THE COURT:

Q. Well, was that the place to which you went—

A. Yes, sir.

Q. —to get your orders?

A. That is where we always look, we look around to see what is going on, the yard master—

Q. Well, what I mean, in the ordinary course of business you would go in, and if you saw orders lying on the desk—

A. It would—

Q. —you would take it for granted they were meant for you?

A. Work orders, yes.

Q. And they would be your work orders which you would follow—

A. Yes, sir.

Q. —in your work?

THE COURT: All right, now, we have it.

MR. FRIEDMAN: Now, I renew the objection, if the Court please. There is nothing to show that these slips were issued on the authority of the defendant company, and, as a matter of fact, we can prove to the contrary.

THE COURT: Well, all right, when you get to the proof you will address that to the jury and they will find the fact, but for the present I will overrule the objection and give you an exception.

BY MR. GERNERD:

Q. Now, Mr. Breisch, what was on this slip that you read?

A. Why, this car of scrap on the dead rail of the scale.

Q. Did it have a number?

A. Yes, sir, Reading 20970, commercial gondola of scrap, it was put on the scale and weighed for Jersey City.

Q. Was the word "Jersey City" in back of this?

A. Yes, sir.

Q. Were there any other cars, any other orders, on this order slip?

A. There was some—some work, some car to E-port, but I didn't pay much attention, because I was interested in this job first, I don't recall the rest.

Q. What do you mean by E-port?

A. Elizabethport, a car, maybe a car moved from number 2 to Elizabethport.

Q. You mean to be moved from number 2—what do you mean by number 2?

A. Well, that is a track where the car was on.

Q. Yes, I know, but—

A. From this scale, the scale had it at—

Q. Well, Elizabethport is where?

A. Over in Jersey City—over in Jersey.

Q. Over in the State of New Jersey?

A. New Jersey, yes.

Q. Yes.

A. Me, call it E-port.

Q. Well, I know, but E-port, were those the initials on this slip?

A. E-port, yes.

Q. Yes.

A. E. p.

Q. And that is supposed to be Elizabethport,—

A. E-port, yes.

Q. —New Jersey, and this particular car that you speak of, that you gave the number of, had a destination on there as to where it was to go?

A. Yes, yes, sir.

Q. Well, where was it?

A. The number of the E-port train?

Q. No, no, no, the first car we are speaking of.

A. The number was 90—20970.

Q. Yes, and where was that to go,—

A. That was—

Q. —according to this order?

A. Jersey City, scrap.

Q. Jersey City?

A. Yes.

Q. Where is that?

A. Over in Jersey.

Q. State of New Jersey?

A. State of New Jersey.

Q. Well, this engine, or this crew, was made up of how many men?

A. Myself as the conductor, and two brakemen, engineer, and fireman.

Q. Yes, then this car number of two thousand and—what was the number?

A. 970.

Q. Two thousand, seven—

A. 970.

Q. Was that gondola car shifted from what they call the dead rail—is that what you call it?

A. Dead rail of the scale on the scale, the dead rail there so—and engine ain't allowed to run over the scale, you know, so they got a dead rail, if you want to go beyond the scale with the engine you have to go over the dead rail and not use the scale. The rails are only about six or seven inches apart.

Q. Yes, and your crew was in the act of doing what, putting this car on the scale?

A. Taking this car off the dead rail, pull it back and move it in on the scale to weigh. I was standing about the middle of the scale, and for some reason or other this car come—became attached from the engine.

Q. Do you mean detached?

A. Detached, yes.

Q. Yes.

A. From the engine, and sneak down, and I just happened to see it, and I jumped on the car and I shoved on the brake, and she didn't respond, and I give her another twist, and another jerk, and I hung on to it, thinking she would hold in a minute, but she didn't take up, and gradually picked up after she got off the scale.

Q. And what happened?

A. Then she went down and bumped into the car spotted on 2, as this scale track leads out on to 2, where cars were spotted for loading and re-loading, and natur-

ally, I jumped on this car to save any damage, somebody might be accidentally walking in there to unload or load something, and when I did hit this car, the car—that car I hit was spotted away from the next car, and I did hit and bumped down to the next one, and the rebound knocked me over, knocked me off my balance, and I stepped for the drawhead, there was no end sill on the car where I hit, I had to step for something so I wouldn't go in under, and that is the way I got caught with my foot.

Q. Were you thrown off your balance?

A. I was thrown off of me balance, over into the coupler.

Q. Was this car running wild before it reached the scale?

A. Yes, sir, she was detached from the engine.

Q. What?

A. Yes, sir, it was running wild, it wasn't coupled up to the engine.

Q. I know, but I mean before it reached the scale was it running wild before it actually reached the scale?

A. Yes.

Q. And when you jumped on this car, this runaway car, how far was that runaway car from the car that was standing on the dead rail into which you ran, and into which this wild car ran?

A. You mean when I come in on the scale, when I got on the car—

Q. Yes, how far—

A. —and broke loose?

Q. How far did that runaway car travel before it collided with the—

A. Four rail lengths, I judge.

Q. Four rail lengths?

A. Four rail lengths.

Q. And what do you mean by a four rail length? What distance is four rail lengths?



A. Well, a rail length is thirty feet.

Q. Thirty feet?

A. What we call a rail length.

Q. So it would be about one hundred and twenty feet—

A. Yes.

Q. —that this wild car ran after you jumped on this car and applied the brake?

A. Yes, sir.

THE COURT: Well, while counsel are looking at the papers, have you covered the technical question of diversity of citizenship? Has he testified that he is a citizen of Pennsylvania?

MR. GERNERD: Yes, sir, he has testified to that, Your Honor.

THE COURT: That is all right, I didn't catch that.

MR. GERNERD: Yes, he has testified, he said he lived at Coopersburg.

THE COURT: Well, he lived there—

THE WITNESS: I was born in Philadelphia.

BY THE COURT:

Q. Well, you are a citizen of Pennsylvania?

A. Oh, my, yes, yes.

BY MR. GERNERD:

Q. How long have you lived at Coopersburg?

THE COURT: All right.

A. Well, I lived in Coopersburg since I was seven years old.

BY MR. GERNERD:

Q. And you lived there at the time this accident happened?

A. Oh, yes.

Q. In other words, you were a voter of Pennsylvania?

A. Yes, sir.

Q. All right, and you still are, are you?

A. Yes, sir.

(Photographs were marked Exhibits P-1, P-2 and P-3)

BY MR. GERNERD:

Q. Mr. Breisch, I show you Exhibit 2. I don't know whether those jurors—

A. I can walk over there if you want me to.

Q. All right, come down here, perhaps you can help us out.

THE COURT: Oh, do you want to move him?

THE WITNESS: I will be all right.

MR. GERNERD: No, that will be all right, just stay where you are. I think we can explain it to the jury.

THE COURT: Well, now, what is it, a photograph?

MR. GERNERD: It is a photograph, yes, sir.

THE COURT: Well, can it be offered in evidence?

MR. FRIEDMAN: I have no objection.

THE COURT: No objection, well, then, show it to the jury first.

MR. GERNERD: Yes.

THE COURT: Let them familiarize themselves with the situation.

MR. GERNERD: Here is a photograph—

THE COURT: Well, just let them study the photographs,—

MR. GERNERD: Pass them along.

THE COURT: —and then you can explain them afterwards.

(The photographs were shown to the jury.)

THE COURT: Have counsel a copy of the Pennsylvania Compensation Act here?

MR. FRIEDMAN: I don't have any. I have cited it in the affidavit of defense.

THE COURT: I know you have, but I want to see the Act.

MR. GETZ: If Your Honor wants it I will get it.

THE COURT: All right, no hurry about it. We ought to have it. You may ask him any question—

BY MR. GERNERD:

Q. On this photograph here the inside rail, is that what is known as the scale rail?

A. Yes, sir.

Q. And the outside rail is what is known as the dead rail?

A. Dead rail.

Q. And the car that you ran into was standing on the dead rail?

A. No, standing on 2.

Q. Well, what do you mean by 2?

A. Why, the dead rail is the rail that runs alongside of the scale. It don't go over the scale, see. An engine there—the reason that dead rail is there is for an engine to go in without interfering with the scale track, because you daresn't run an engine over the scale.

Q. Yes.

A. That is what they call a dead track, well, it is really a dead track until it gets beyond the switch that leaves from the scale through on to 2, although you can use that dead track to go down on 2. That is what the dead track is for. Naturally—

Q. In other words—pardon me.

A. Naturally, the dead scale track also heads out on 2, and the same car—that is where I came down on, the car that was spotted on 2.

Q. Is that the track adjoining the building?

A. Yes, sir.

Q. As shown by these photographs in the distance?

A. Alongside them buildings there.

Q. Yes.

A. In the photograph.

Q. And that is the track which you call number 2?

A. Yes, sir.

Q. Now, when you come to the photograph showing where the scale is there is a scale track and what is known as a dead track?

A. Well, it is a dead—

Q. Now, wait, and they lead, after the car is weighed on the scale and pushed on, they lead on to track number 2?

A. Yes.

Q. In other words, the dead track as well as the scale track finally lead into track number 2?

A. Yes.

MR. GERNERD: In other words, can you folks see from there?

A JUROR: Yes.

BY MR. GERNERD:

Q. Now, will you point out on this Exhibit 3 just what you mean, so that this jury can understand what you mean by the—now, wait,—

A. Well, that—

Q. Now wait, this way.

A. Oh, that there is the worst end, the worst end of the siding number 2, that there is number 2 track.

Q. You mean down in there (indicating)?

A. Yes, below that scale switch. Here is your dead track.

Q. Where is your dead track?

A. That is your dead track (indicating).

Q. Is this up at the scale here, is this a part of the scale here (indicating)?

A. Yes, and that is on the outside.

Q. Well, that is all right.

A. This here is the dead track, this too is dead track, and that there on that one is a scale. Now, you can—you can come down on 2, by using the dead rail, or you can come down on 2 by using the scale, there is a switch, so you use what they call a dead rail between this switch and the east end of the scale. The switch enters into the scale track.

Q. And this down here enters into—

A. 2.

Q. —track number 2?

A. Yes.

Q. Which you call track 2?

A. This here is track 2.

Q. Yes, now, where—

A. No cars on there just now.

Q. All right, looking at Exhibit 3, point out where this car was standing that you ran into with the wild car.

A. I wouldn't say how far below that building, below the corner of that building, but it was—

Q. Below the corner of that building?

A. —five foot or more, maybe, when I hit it.

Q. You mean when this runaway car ran into the car that was standing there—did you folks, did you understand what we mean by dead rail?—can you show by Exhibit 1 where this building was that you got this order, this written order?

A. That was the trainman's shanty.

Q. Is that the trainman's shanty, is that the building that the trainmen use?

A. Yes.

Q. And where they get their orders from to do work here in connection with shifting cars?

A. The yard master—

Q. Yes.



A. That is where they eat their dinner. That is what they call the trainman's shanty.

Q. And is there where you get your orders?

A. That is where I got my orders, yes.

Q. Yes, had you worked in this yard before?

A. Yes, sir.

Q. Did you get orders there before?

A. Yes, sir.

Q. At this same place?

A. Yes, sir.

Q. Now, Mr. Breisch, you said this car 20970, this runaway car, was what kind of a freight car?

A. What they call a commercial steel gondola, three foot high.

Q. What is it—

A. With a hand brake on.

Q. Is it known, commonly known as a gondola car?

A. Gondola, yes.

Q. In other words, it is an open car?

A. Open car.

Q. It is not encased, enclosed?

A. No, not enclosed.

Q. And have you any idea of the length of this car?

A. I am a little off on them series; I think it is forty-two foot, though.

Q. You mean the gondola car, the runaway car, in your judgment—

A. Forty-two foot.

Q. —was forty-two foot, and you say it had a hand brake?

A. Yes, sir.

Q. Will you explain to this jury as best you know what kind of a hand brake it had and where it was located with reference to this car—I mean on this car?

A. Well, it is a brake—the brake staff with a wheel on it, and the chain comes from the brake, the brake shoes,

and wraps around this—around this brake staff and pulls the brake on as you wind it up.

Q. Well, have you had experience in operating hand brakes?

A. Oh, yes, after thirty-nine years of railroading I had lots of experience.

Q. With that kind of a brake?

A. Same thing, type car.

Q. With that same kind of a brake?

A. Yes, sir.

Q. The same type?

A. Yes, sir, same type.

Q. Exactly like that?

A. Yes, sir.

Q. Have you any idea of the length of the chain at the base of this brake?

A. What do you mean, from the—on that car or on all cars?

Q. Well, I mean that—well, the—

A. Well, some have different—different lengths, some have different lengths of chain, but just—it just depends on how far it is from the brake staff and the brake rod.

Q. I see, now—

A. Some have—some have too much chain—

Q. Yes.

A. —and get clogged up when you wind—when they wind around that brake stem. That is what—that is what keeps you from pulling any harder. Then, again, the brake rod sometimes catches somewheres and won't let you pull, then—all kinds.

Q. Do you know what actually happened that morning—

A. Well, I—

Q. —when you applied that brake?

A. I was going to look, but when I stepped off the car I had my foot mashed and my leg broke, when I stepped

off the car I had an awful pain and I forgot all about it. I seen there was lots of—

Q. Now, if this car had worked, I mean, if that brake had operated or responded when you applied it could you have stopped that car and prevented it from running into this other car?

A. You bet I could. I only wish I had—I could say how quick I could stop it if I—

Q. Well,—

A. I could easy stop it in that distance, see?

Q. In what distance?

A. In the distance from where I jumped on, at the time I had the brake applied, I judge it would be about three and one-half rail lengths, I could easy stop it in that, at the rate of speed it was going, between two and a half and three mile when I jumped on, but it picked up gradually, I wouldn't say just how much, because that is impossible for me to say that, because I was only interested in stopping the car.

Q. I see.

A. I wasn't interested in anything else, just stopping the car.

Q. Well, that was a loaded car with scrap?

A. With scrap, yes, sir.

Q. And you say you have experienced braking the same kind of a car with the same kind of a brake and loaded?

A. Yes, sir, all kinds of cars I have experienced braking.

Q. Well,—

A. This particular—

Q. —this particular car, if this brake had responded and worked that morning within what distance could you have stopped that car, taking into consideration the speed at which it was then traveling when you jumped on that car?

A. Well, between forty-five, fifty foot.

Q. Forty-five, fifty foot, and you say this car ran—the moment you got on—four rail lengths before it struck this other freight car?

A. Since before I got on, when I got on, I judge about three and one-half, after I spun the brake. It only took me a minute to spin the brake around, it only took two steps to get on, the brake was right at the end where I got on.

Q. I see.

A. So it was just merely a step up and started to pull, I spun the wheel around, I always, when I am in a hurry like that, I spin the wheel with my hand.

Q. So that after you actually had given your full strength to this brake it didn't respond, did it?

A. No.

Q. And it continued to run wild?

A. Yes, sir.

Q. Well, what happened after this—your injury that morning, what became of you?

A. Well, they took me to the hospital.

Q. What hospital?

A. Sacred Heart Hospital, in Allentown.

Q. Yes.

A. And I don't know what was done. They didn't take the foot off right away, but I guess what they call first-aid, I don't know, they tried to save the foot, anyhow.

Q. Well, what was the matter with your foot?

A. It was all mashed in the front part.

Q. And how long were you at the Sacred Heart Hospital?

A. Why, I was up—I was on the Sacred Heart Hospital from December 31, 1936 until April 22, 1937. During that time I—well, on January 9th they finally took the foot off—or was it the 8th? I ain't sure of that.

Q. Well, what year?

A. 1937.

Q. Well, did you have—did you have any operations? Did they have—

A. January 7th—8th—I think it was January 8th.

Q. Well, 1937?

A. 1937, they took the foot off, part of the foot. I only had the heel left. I was in the hospital until April 22nd.

Q. Yes.

A. Then I was under company doctor care until November the 12th, 1938.

Q. Until what happened?

A. It never healed up. Well, August 3, 1938 the company doctor took me in the Sacred Heart Hospital again for an operation. That is August 3, 1938.

Q. Yes.

A. Last fall I had another operation on the 7th of August, and it didn't work right, not the way they wanted it to work, so I got a skin graft on the 24th of August. I come out on the 12th—12th of November, 1938. I went home and showed—they told me I had no—don't need any more physical attendance, so I went home to my family doctor and he took me up to Dr. Muschlitz, about two weeks after, after the thing had opened all up again, Dr. Muschlitz, in Allentown, and he sent me in the hospital on December 13th, operated on the 15th, and I came home the evening before Christmas, December 24th.

Q. 19—what year?

A. 1938.

Q. What hospital were you for that last operation?

A. The last operation I had in Allentown Hospital.

Q. The Allentown Hospital?

A. Yes.

Q. Did they amputate any portion of your leg?

A. ~~X~~es, they took—they took it off, I think about—I wouldn't say for sure—about nine inches below the knee, nine inches below the knee is where they took it off (indicating).



Q. Well, how many operations did you have between the time that you were injured and this last one?

A. Four.

Q. Four?

A. With this last one, yes.

Q. Four, on this same leg?

A. Same leg.

Q. As a result of this injury—

A. Yes, sir.

Q. —that you received on the 31st of December, 1936?

A. 1936, yes, sir.

Q. Who were the other doctors that operated upon you?

A. Dr. Hausman, at the Sacred Heart Hospital, done the operation.

Q. Allentown?

A. Allentown, yes.

Q. Did he perform the first three operations?

A. Yes, sir.

Q. And Dr. Muschlitz the last one?

A. Yes, sir.

Q. How old are you, Mr. Breisch?

A. Sixty-three.

Q. Sixty-three. Are you married?

A. Yes, sir.

Q. Have a family?

A. Family of ten children, yes, sir.

MR. FRIEDMAN: If the Court please, that is objected to.

THE COURT: What is that?

MR. FRIEDMAN: That is objected to as incompetent.

THE COURT: Oh, no, the jury are entitled to know the surrounding of the witness. It may have

some slight bearing on his credibility, I don't know.

BY MR. GERNERD:

Q. And what were you earning, what was your average earning on or about the 31st of December, 1936?

A. Oh, about forty dollars a week,—yes.

Q. Forty dollars a week?

A. An average, year-round, yes.

Q. And is railroading the only occupation that you followed?

A. Yes, sir, ever since 1897.

Q. What was your state of health before the 31st of December, 1936?

A. I wish it was—it was fine.

Q. What?

A. It was fine. I wish it was like that now.

Q. Have you been able to do anything since that accident? Have you earned anything?

A. No, sir, not a penny. I was in the hospital most of the time.

Q. Ever since then you have been in the hospital most of the time?

A. Most of the time.

Q. Yes.

A. Been under the doctor's care; physical wreck, you might call it.

Q. Mr. Breisch, did you pay any of the hospital bills or doctor bills?

A. No, I haven't paid—I got a bill, though, of \$311 to pay yet. Besides, I haven't Dr. Hausman's bill, whatever the operation was, I ain't got that bill. I paid my last hospital bill all but the operation. Dr. Muschlitz, I didn't pay his yet, \$105.

Q. How much?

A. \$105.

Q. \$105 is Dr. Muschlitz's bill?

A. Yes, that is for—

Q. What did you pay at the Allentown Hospital?

A. Eighty—eighty-six dollars, I think.

MR. GETZ: There is one for thirty-eight, and one for forty-three. They are marked paid.

BY MR. GERNERD:

Q. I show you these—pardon me.

(Bill dated 12-17-1938, to Mr. Howard Breisch, from the Allentown Hospital Association; for \$38.00 was marked Exhibit P-4.

Bill dated December 24, 1938, to Mr. Howard E. Breisch, from the Allentown Hospital Association, for \$43.00 was marked Exhibit P-5).

THE WITNESS: They were paid.

MR. GERNERD: That is all right.

BY MR. GERNERD:

Q. I show you Exhibits P-4 and P-5. Do you recognize those exhibits?

A. Yes, sir, yes.

Q. What are they?

A. Operation.

Q. Well, they are the hospital bills?

A. Yes.

Q. Yes.

A. That is for the ward, where I was in.

Q. Yes, and you paid these?

A. They are paid.

Q. Yes, and is this the bill of the Sacred Heart, I show you—well, now, wait.

(Bill dated November 12, 1938, to Mr. Howard Breisch, from Sacred Heart Hospital, for \$311.00, was marked Exhibit P-6.)

BY MR. GERNERD:

Q. I show you Exhibit 6. Will you look at that? What is that? What does that represent, Exhibit 6?

A. Why, this here is the hospital bill. This here is my last one, from August 3rd until—

Q. Well, what hospital?

A. Sacred Heart Hospital.

Q. Sacred Heart Hospital, and how much is that?

A. \$311.

Q. \$311., and the other two bills, the Allentown Hospital, were \$81.?

A. Yes.

(Bill dated April 1, 1939, to Mr. Howard Breisch from Charles H. Muschlitz, M. D., for \$105.00., was marked Exhibit P-7.)

BY MR. GERNERD:

Q. I show you Exhibit 7. Will you kindly look at that and tell the jury, Court and jury, what that represents?

A. Well, this here is for the operation.

Q. By whom?

A. Dr. Muschlitz.

Q. What does it amount to?

A. He performed—he performed the operation the Allentown Hospital on December 15th, 1938.

Q. What does it amount to?

A. \$105.

Q. \$105.?

A. Well worth it!

MR. GERNERD: We offer these exhibits in evidence.

(Copies of Exhibits P-4, P-5, P-6 and P-7 follow):

BY MR. GERNERD:

Q. Mr. Breisch, do you know how it happened that this gondola car became detached from the engine while it was in the act of putting this car upon the scale?

A. I—I don't know, I was going to examine it, but the pain got too great, I couldn't.

Q. In other words,—

A. I didn't know what caused them to break loose, whether it was a worn knuckle, or it might have been a high knuckle.

Q. Well, you don't know?

A. I don't know.

Q. But it had been attached to the engine?

A. You bet, and pulled back.

Q. Yes, and as they were putting it on the scale it detached, is that it?

A. Yes.

Q. And ran away?

A. Ran away.

MR. GERNERD: Cross-examine.

THE COURT: Well, you may conduct your cross-examination after the lunch hour.

Members of the jury, you are relieved until two o'clock. Just resume the seats you now occupy.

I would like to see counsel at side bar a moment.

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(Recess, 12:30 until 2 o'clock P.M.)

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After Recess

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Present: Counsel as before noted.

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HOWARD E. BREISCH, recalled.

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MR. GERNERD: Cross-examine.

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*Cross Examination*

BY MR. FRIEDMAN:

Q. Mr. Breisch, you live in Coopersburg, is that correct?



A. Yes, sir.

Q. What did you say your age was?

A. 63.

Q. Now, on and just prior to December 31, 1936, you were employed by whom?

A. Central Railroad Company of New Jersey.

Q. By the Central Railroad Company of New Jersey in what capacity?

A. Regular extra conductor.

Q. Regular extra conductor?

A. Yes, sir.

Q. That was in connection with freight trains, was it?

A. Yes, sir.

Q. How long had you worked as an extra conductor?

A. I can't recall just when I got that job. I was a conductor since 1918. I had steady work until the depression come; then I was sent back to braking a while. Then I was emergency extra conductor and brakeman. Then I got the job, I think I had it about a year.

Q. About a Year?

A. About a year or more.

Q. What trick did you work?

A. On this date?

Q. On that date.

A. I was called for 7 A. M.

Q. For 7 A. M., and where did you go?

A. I went to the wire mill.

Q. To the wire mill?

A. American Steel and Wire Mill.

Q. Where did you leave from to go to the Wire Mill?

A. From my home at Coopersburg.

Q. From your home in Coopersburg?

A. Yes, sir.

Q. Did you go directly from your home to the American Steel and Wire Company yard?

A. Certainly.

Q. The American Steel and Wire Company is a private concern, they have their own private yard there where you were working, is that correct?

A. Yes, sir.

Q. They have their own private scale in that yard?

A. Yes, sir.

Q. And that is the scale you have been talking about here in court today?

A. Yes, sir.

Q. What time of the morning did you get to the American Steel and Wire Company yard?

A. I got there right at the scale at about five minutes of seven.

Q. Five minutes of seven?

A. Yes, sir.

Q. Who did you see there?

A. Nobody, no one there.

Q. No one there?

A. No.

Q. Wasn't Mr. Pagel there?

A. Who?

Q. Pagel.

A. I didn't see him. They were in back on the south side of the building with the engine.

Q. Who were you to work with there?

A. With Pagel and McGowan.

Q. With Pagel and McGowan.

A. They were the train crew.

Q. What was Pagel's duties?

A. He was a brakeman.

Q. What was Mr. McGowan's duties?

A. Brakeman.

Q. Who had told you to go to the American Steel and Wire Company?

A. The crew dispatcher at the Allentown yard.

Q. When did he tell you that?

A. About ten minutes of six in the morning.

Q. About ten minutes of six in the morning?

A. Yes, sir.

Q. Where did he tell you that?

A. On the telephone.

Q. Then you went down to the American Steel and Wire Company yard?

A. I caught the 6:15 Philadelphia car to Allentown.

Q. Do they have a yard master at the Steel Mill yard?

A. Yes, sir.

Q. Who is that yard master?

A. Koehler, I think.

Q. Is he here in the room; do you know?

A. Yes, sir.

MR. FRIEDMAN: Mr. Koehler, will you stand up?

(A gentleman stood up in the courtroom.)

BY MR. FRIEDMAN:

Q. Is that the man?

A. Yes, sir.

Q. He is the yard master; had you ever worked in this yard before?

A. Oh, yes.

Q. On how many occasions?

A. Well, I forget just exactly. I had the second trick in there; I don't know, it was during the War time, I can't just exactly say, for four or five months.

Q. And you say that Mr. Koehler was never in that yard?

A. Not at that time.

Q. What do you mean, not at that time?

A. He wasn't yard master at that time.

Q. What time?

A. When I was conducting there regular.

Q. Now, how about December 31st, the morning of the accident?

A. I suppose he was there, but I didn't see him.

Q. Was he in charge just before that?

A. Yes, sir, as far as I know.

Q. And as such, he was in complete charge of the yard, and gave directions what you were to do, is that correct?

A. Yes, sir.

Q. You received and took your directions from Mr. Koehler, is that correct or incorrect?

A. Not this morning.

Q. I say when you went to work there in the yard on other mornings.

A. Yes, sure.

Q. You had been told that you were to work with Mr. Pagel and Mr. McGowan?

A. I was called to conduct the engine.

Q. You were called to conduct a train on which Mr. Pagel and Mr. McGowan would work?

A. Yes, sir.

Q. When you got to the mill, where McGowan and Pagel were ahead of you?

A. Yes, they were ahead of me because they done some work that I don't know where they got their orders from, on the south side of the building.

Q. You don't know where they got their orders?

A. I don't know where they got their orders.

Q. Do you know what work they were doing?

A. No, sir, it was not on that slip that I seen. Of course, it might have been on, I don't know, I didn't read the slip altogether; that is, the latter part. It might have been on the latter part of it, I don't know.

Q. You are talking about the slip you mentioned earlier in the morning?

A. Yes, sir.

Q. Where did you first meet up with Mr. Pagel and Mr. McGowan?

A. The engine came from the south side of the building to the east end of the yard.

Q. Did they come over to where you were?

A. Yes, sir; they just come down, and I ran over to meet them.

Q. You went over to meet them?

A. Yes, sir.

Q. Where did you meet them?

A. Right over there, right next to the scale shanty coming down from the south side.

Q. Were they coming on to the scale track or the dead track in front of the scale shanty?

A. Yes, sir.

Q. They had this Reading car 20970, is that right?

A. No, sir, it was standing on the dead track.

Q. What were they on? How did they come over?

A. McGowan went with the engine out to the switch, and Pagel walked across to me.

Q. Pagel walked over toward you in front of the scale shanty?

A. Yes, sir.

Q. And McGowan was with the engine?

A. Yes, sir.

Q. Where was car 20970?

A. On the dead rail on the scale.

Q. Was it on that car that you had been riding when you were hurt?

A. Yes, sir.

Q. Do you know where car 20970 had come from?

A. From Aronsky's Scrap Yard.

Q. Did you bring it over there?

A. No, sir.

Q. Then, of your own knowledge, do you know where that car came from? Not what somebody might have told



you, but what you yourself, might know about that car. Do you know where that car came from?

A. I know from Aronsky's Scrap Yard.

Q. How do you know that?

A. I was told that.

MR. FRIEDMAN: If the Court please, I move to strike that out.

THE COURT: Develop what he means by being told that.

BY THE COURT:

Q. Did it have a regular run, or was this special?

A. It was along in the regular routine of the yard work in the day.

BY MR. FRIEDMAN:

Q. Mr. Breisch, this Reading car was there in the yard of the American Steel and Wire Company when you got there, was it not?

A. Yes, sir.

Q. It was in the yard, it was right in front of the scales, was it not?

A. Yes, sir.

Q. Was it empty or loaded?

A. Loaded with scrap.

Q. When McGowan and Pagel and the drill engine came over, what were your immediate duties with reference to that particular car? What were you to do?

A. Get it off the dead rail and put it on the scale and weigh it.

Q. Did you weigh it? Did it get weighed?

A. No.

Q. The accident happened before you could weigh it?

A. Before we got it weighed.

Q. When you were hurt, that was what you were trying to do, get it on to the live rails for the purpose of weighing it on the scales of the American Steel and Wire

Company, is that correct? That is what you were trying to do?

A. Yes, sir.

Q. Just prior to the accident was this drill engine connected with this Reading car number 20970, before the accident?

A. Before the accident?

Q. Before the accident?

A. No. You mean before the engine was around?

Q. No, after the engine was around and before you were hurt.

A. She was coupled up to it then.

Q. On which end of the Reading car was the engine coupled, the west end or east end?

A. Eastern end.

Q. That would be towards the entrance of the yard of the American Steel and Wire Company?

A. Yes, sir.

Q. And away from what they call the loading platform?

A. Yes, sir.

Q. Who made that coupling, if you know, Mr. Breisch?

A. I ain't so sure about that: I think Pagel made it.

Q. What, if anything, did you help to do in the making of the coupling?

A. I just stood there and looked at it.

Q. You stood there and looked; you mean by that, that you saw Mr. Pagel made the coupling?

A. Yes, sir.

Q. Did you assist in any way?

A. No.

Q. Did you help, also, or adjust the knuckles?

A. No, sir, I stood there and looked at him.

Q. After this coupling was made, what next happened to this Reading car number 20970?

A. We pulled it back—

Q. Wait a minute, I want this jury to understand when you say back, by that you mean in a westerly direction?

A. Easterly direction.

Q. That would be towards the entrance of the yard and away from the loading platform, as it is called?

A. Yes, sir.

Q. You had the engine taking the car away in an easterly direction, is that correct?

A. Yes, sir.

Q. Was the Reading car at that time attached to any other car?

A. No, sir.

Q. What had become of the other car?

A. What other car?

Q. Was there another box car there?

A. There was no other car there.

Q. What did the engine and the Reading car next do so far as you are concerned?

A. Shoved in on the scales with this car.

Q. Shoved it, you mean it had gone easterly toward the switch?

A. To the east end of the switch—

Q. Mr. Breisch, I suppose to clear the switch—

MR. GERNERD: Give him a chance to explain.

MR. FRIEDMAN: I am giving him all the chance in the world.

MR. GERNERD: No, you are not.

BY MR. FRIEDMAN:

Q. I want you to explain anything you wish.

A. To pull it back beyond the switch that leads in on the scale.

Q. And you had to do that, you had to clear the switch?

A. Yes, sir.

Q. You wanted to get it back, your idea was to get that Reading car back on the scale to weigh the car?

A. Sure.

Q. How far is the switch from the scales, in your opinion?

A. I judge about—from the end of the scale?

Q. Yes, you can take it at the end of the scale.

A. I judge about sixty feet.

Q. Now, then, the engine and the Reading car started to move in a westerly direction?

A. Yes, sir.

Q. How far had they gone before something next happened? How far had they gone in a westerly direction before something next occurred, in your opinion?

A. Oh, about a car length.

Q. Mr. Breisch, I wonder if you mind telling us just what a car length is.

A. 42 to 46 feet.

Q. In other words, you mean the car had gone about 42 to 46 feet in a westerly direction?

A. In a westerly direction, yes.

Q. Then what happened?

A. The car was broke loose.

Q. The car broke loose?

A. Yes.

Q. Just before the car broke loose about how fast were you going?

A. I judge two and a half or three miles an hour.

Q. That is pretty slow, isn't it?

A. Yes.

Q. There is no perceptible grade there, is there?

A. There is a slight grade.

Q. Very slight, isn't it?

A. Yes, slight grade.

Q. How near to the scale house were you when you saw this car came loose?

A. I was standing about in the center of the scale.

Q. Then we have it breaking loose in the center of the scale platform, is that correct?

A. When I got on, yes.

Q. Is that where you got on?

A. About the center of the scale, yes.

Q. You got on at the center of the scale; by the way, was it a dry morning or a wet morning?

A. It had been raining pretty hard in the morning when I went for the trolley, but at the time of the accident I had stopped because I had nothing on but a blouse.

Q. Mr. Breisch, when you saw this car travelling loose, that, you mean away from the engine, is that correct?

A. Yes, sir.

Q. How far did it go before you first noticed it was loose?

A. You mean from the time it entered the switch?

Q. No, from the time it got loose when you first noticed the car was loose from the engine.

A. Well, I took notice just about when it was about the point of the switch to come in on the scale. There where I seen the break.

Q. What did you next do when you saw the car was loose?

A. I jumped on the car.

Q. Did you do anything before that, Mr. Breisch?

A. I stood there to take the light weight, and put it back of the number of the car.

Q. That is what you were doing at the time, you were weighing the car, is that right?

A. I was waiting for the car to come in and to take the light weight, and the capacity of the car to give it to the scale master whenever he came around.

Q. What was the first thing that you did, Mr. Breisch,



when you noticed that the Reading car was loose from the engine?

A. Well, knowing that track ran out on to the track where they spot and light load, I made for the car to do what I could to stop it.

Q. Did you try to put any blocks under the car?

A. There was none around there.

Q. Did Mr. Pagel try to put any blocks under the car?

A. Yes, I think Mr. Pagel did try to put blocks under the car.

Q. What did he do?

A. I don't know whether he got any or not.

Q. Did you see him put blocks under the car?

A. I seen him hunting for some.

Q. Did you hunt any?

A. No, sir.

Q. But you saw Mr. Pagel hunting?

A. Yes, sir.

Q. Where did he hunt for blocks?

A. Just around the scale.

Q. Did you see him do that?

A. Yes, sir.

Q. Was that before or after you got on the train?

A. After I got on.

Q. Do you want this jury to understand you were on the train, then, and you turned around, and you saw Mr. Pagel hunting blocks?

A. Well, I could see him do that when I was riding along, as far as that is concerned.

Q. What did you do when you were riding along with the car?

A. Tried to stop it with the hand brake.

Q. In what way?

A. Put the hand brake on.

Q. Was it while you were turning the hand brake you saw Mr. Pagel hunting blocks?

A. I looked once in a while to see how much distance I had, naturally; I didn't just specially look and watch him pick them up; I seen him doing something.

Q. Mr. Breisch, how far was the Reading car from these spotted cars at the time you applied the brakes?

A. At the time I applied the brakes, from the time I had the brakes applied, you mean, until she hit one?

Q. Yes.

A. About three and a half rail lengths.

Q. Three and a half rail lengths?

A. I judge.

Q. From the time you applied the brake until you came to the car that was spotted?

A. Yes.

Q. I wonder if you would be good enough to tell this jury how long a rail length is.

A. Thirty feet.

THE COURT: He told us that, thirty feet.

MR. FRIEDMAN: He told us about a freight car.

THE COURT: No, he told us about a rail length.

BY MR. FRIEDMAN:

Q. How long it is?

A. Thirty feet.

Q. Were you hurt, Mr. Breisch, before the Reading car struck any other object, or afterwards?

A. After it hit the car I went into, after I hit that car, that car ran up against another car being spotted away from the one I hit, and rebounded and throwed me, and I stepped from the drawhead, there was no end sill on that car, I had to either do that or go in under it, and I missed it and went in between.

Q. Mr. Breisch, what was the other car that was struck by this Reading car 20970?

A. There was a loaded car.

Q. Was it a loaded car or a box car?

A. Box car.

Q. Where was that box car?

A. On number 2.

Q. Where was it with reference to the weighing scale?

How far west of the weighing scale building was it? First, am I right in saying it was west of the weighing scale building?

A. I would say about 130 feet.

Q. 130 feet west—

A. No, not from the scale—

Q. I am talking about the scale.

A. I took it from the building, I judge about 105 or 10 feet.

Q. From the weighing scale?

A. Yes, from the weighing scale, from the end of the scale.

Q. As a matter of fact, wasn't that car on the dead track of the scale? Was it or was it not?

A. It couldn't be.

Q. Sir?

A. It couldn't be.

Q. Just exactly where was it, Mr. Breisch?

A. I couldn't exactly tell you that, but I know it was—I am sure it was about five foot below that building, the first building behind the trainmen's shanty.

Q. Is that one of the main buildings, Mr. Breisch?

A. Yes, sir.

MR. FRIEDMAN: That's all.

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*Redirect Examination*

BY MR. GERNERD:

Q. Mr. Breisch, Mr. Friedman asked you where this spotted car was standing on the rail number 2 that you

spoke of that the run-a-way car ran into. Point that out to the jury.

A. Well, I don't know, I judge about—

Q. Turn the photograph the other way.

A. I am sure about five foot, I don't know just exactly.

Q. Five foot what?

A. From that corner, maybe more.

Q. Just a moment. The witness speaks about this point on this building (indicating), showing that on Exhibit 1. Mr. Breisch, I show you Exhibit 2; is this the switch that you spoke of where the engine brought up this car 20970 above the weight scale?

A. This weight switch is right here where we entered in (indicating).

Q. Is this the switch you mean above the weight scale?

A. Yes, sir.

Q. This car was put on the scale track?

A. Supposed to be put on there.

Q. Yes, I know; it didn't get there. Do you understand that, folks?

A JUROR: Yes.

MR. GERNERD: That's all.

MR. FRIEDMAN: I would like to recall Mr. Breisch for an additional question.

MR. GERNERD: Sure.

MR. FRIEDMAN: Called for further cross-examination.

THE COURT: Is it just one question?

MR. FRIEDMAN: It may be a few. I am perfectly willing to interrogate him where he is.

MR. GERNERD: Just let him stand in front of you here.

MR. FRIEDMAN: Wouldn't he be more comfortable seated?

MR. GERNERD: I don't know what you want.

MR. FRIEDMAN: I can't tell until I ask him.

MR. GERNERD: I beg your pardon. I want to be helpful.

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HOWARD E. BREISCH, recalled.

*Recross Examination*

BY MR. FRIEDMAN:

Q. Mr. Breisch, you did testify that at the time of the accident and just prior to the accident you were employed by the Central Railroad of New Jersey as an extra conductor, is that right?

A. Regular extra conductor, yes, sir.

Q. Just where did you do your work? Where had you been working, say, for a month previous to the accident?

A. Allentown yard terminal station.

Q. You mean by that, your work was confined in and about the Allentown Terminal Yard?

A. In and about, and road work if it called for road work.

Q. At or about the time of the accident your work was confined in and about Allentown?

A. Yes, sir.

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*Redirect Examination*

BY MR. GERNERD:

Q. At the moment that interstate cars were coming from different sections?

MR. FRIEDMAN: I object to that as immaterial.



MR. GERNERD: Your Honor, he was asked a question by Mr. Friedman—

THE COURT: You were asking him whether or not at the time referred to cars did move in interstate commerce.

MR. GERNERD: Yes, sir.

THE COURT: Is that objected to?

MR. FRIEDMAN: It is, sir.

THE COURT: Objection overruled, exception noted for the defendant.

MR. GERNERD: That is all, Mr. Breisch.

THE COURT: Has he answered it?

BY MR. GERNERD:

Q. What was your answer, Mr. Breisch?

A. Yes, sir.

MR. FRIEDMAN: I want to move at this time that the last answer and question asked of Mr. Breisch by his counsel be stricken from the record.

MR. GERNERD: To which we object, of course.

THE COURT: Motion denied, exception to defendant.

MR. GERNERD: If the Court please, at this time the defendant moves for a directed verdict in this case for the following reasons:

First, there can be no recovery under the Federal Employers Liability Act because the Plaintiff has not properly proved that he and the Defendant were engaged in interstate commerce at the time of the accident.

Two, there can be no recovery under the Safety Appliance Acts because Plaintiff has not brought himself within those acts, and his remedy, if any, is under the Pennsylvania Workmen's Compensation Act of 1915 and the supplements and amendments,

Three, that plaintiff has not made out a probable case of negligency on the defendant's part, or failure of the defendant to comply with the Safety Appliance Act, or such freedom from contributory negligency on his own part as would warrant and recovery by the plaintiff in this case.

THE COURT: Motion denied; exception allowed to the defendant.

MR. FRIEDMAN: Does the Court reserve decision?

THE COURT: No, there is nothing to reserve as yet. This case is the ordinary negligence case, and you are bringing into it these special acts of Congress. As far as the case has developed, we have nothing to do with the Acts of Congress. It is a mere suit under the common law doctrine of negligence.

MR. FRIEDMAN: If the Court please, of course, the plaintiff must bring himself within the acts, and comply with the requirements.

THE COURT: You may take any position you please.

MR. FRIEDMAN: Does the Court grant us an exception?

THE COURT: I granted you an exception.

MR. FRIEDMAN: Mr. Koehler:

THE COURT: Mr. Friedman, I call your attention to the fact that you haven't opened to the Jury.

MR. FRIEDMAN: I am not making any opening.

THE COURT: All right. I thought maybe you had overlooked it.

DEFENDANT'S EVIDENCE

OSCAR KOEHLER, having been duly sworn, was examined and testified as follows:

*Direct Examination*

BY MR. FRIEDMAN:

Q. Mr. Koehler, where do you live?

A. I live in Allentown.

Q. Allentown, Pennsylvania?

A. Yes, sir.

Q. How long have you lived there?

A. 29 years.

Q. What is your occupation?

A. I hold two positions in the Wire Mill, yard foreman and yard master.

Q. Yard foreman and yard master?

A. It doubled up since the depression.

Q. What is the name of the company that you work for?

A. American Steel and Wire Company.

Q. That is located where?

A. In Allentown.

Q. About how far from the Allentown terminal yard, as it is called, if you know?

A. Oh, I would say about four blocks.

Q. You have railroad tracks in your yard there?

A. Yes, sir.

Q. By the way, the American Steel and Iron Company is a private concern?

A. Yes.

Q. Private manufacturing concern?

A. Yes.

Q. They have railroad tracks in their yard?

A. Yes, sir.

Q. How long have you been employed by this company?

A. 14 years.

Q. What were your duties on and prior to December 31, 1936?

A. Well, for 7 years I was only yard foreman; I am talking about prior to that, and this coming June 1st seven years ago I got the yard master job in connection with my yard foreman job.

Q. You were the yard master on December 31, 1936?

A. Yes, sir.

Q. And prior to that?

A. Yes, sir.

Q. What were your duties as yard master?

A. Move all loaded cars out of the mill by directions from the shipping clerk, then spot empties in as directed by them and asked for, disposing of these cars on a track to later on be delivered to Gordon Street.

Q. You were in charge of the movement of cars in the yard of American Steel and Wire Company on December 31, 1936, and prior thereto?

A. Yes.

Q. Do you remember the morning of December 31, 1936?

A. Yes, sir.

Q. Do you remember this gondola car, Reading number 20970?

A. Very distinctly.

Q. When had that come into the yard?

A. One or two days before, I just don't recall.

Q. After it came in was it unloaded?

A. It was unloaded the same day it got in the yard.

Q. When was it reloaded?

A. I believe that same night.

Q. That would be about when?

A. I would have to go on records to show you that exactly.

Q. You have the record?

A. I have the records with me.

Q. Are these your official records?

A. These are the daily records on my desk for my own benefit.

Q. When was the Reading car 20970 reloaded?

A. 20970 was reported to me as loaded from the freight house on the 26th of December.

Q. Did that car remain in your yard until the morning of December 31, 1936?

A. Yes, sir.

Q. Was it loaded on that morning?

A. It was loaded the evening before.

Q. On the early morning of December 31, 1936, was it in the yard of the American Steel and Wire Company in a loaded condition?

A. Yes, sir.

Q. What was to be done that morning with that car?

A. That car was to be delivered on the scale so I could weigh it after I returned from checking the yard.

Q. Where are the scales?

A. The track scales?

Q. Yes.

A. Right on the same track—

Q. In the American Steel and Wire Company's yard?

A. In the yard.

Q. Who is in charge of the weighing?

A. I, myself.

Q. You are, yourself?

A. Yes.

Q. As a matter of fact, after the accident was that car actually weighed?

A. Oh, yes.

Q. That car was loaded for shipment to where, if you know?

A. Pencoyd, Philadelphia.

MR. GERNERD: Now, wait. Of course, if Your Honor please, I object to anything that took place immediately after the accident, or after the accident happened.

THE COURT: All right.

MR. GERNERD: It might have been routed some other way.

THE COURT: For the life of me, I don't catch what difference it makes whether it was Philadelphia or Kalamazoo.

MR. GERNERD: All right, go ahead.

THE COURT: There may be a reason for it developed later; thus far, there has been no reason developed.

BY MR. FRIEDMAN:

Q. Where had that car been loaded for shipment, to where?

A. At the rear of Number 2 track.

Q. In your yard?

A. Yes.

Q. And after it was weighed, where was that car to be shipped loaded?

A. To Pencoyd, Philadelphia.

Q. Pencoyd, Philadelphia; that is in Pennsylvania?

A. In Pennsylvania. By the way, it is a subsidiary of the U. S. Steel, and we were not allowed to ship scrap to any other place..

MR. GERNERD: That is objected to.

BY MR. FRIEDMAN:

Q. Was this car filled with scrap?

THE COURT: Just a moment. There is an objection. What difference does it make?



MR. GERNERD: All right, it is immaterial.

BY MR. FRIEDMAN:

Q. Was this car filled with scrap?

A. Yes, sir.

Q. Who gives the orders in the yard what are to be done with cars?

A. I, myself.

Q. Who gave the orders with reference to Reading car 20970 on the morning of December 31, 1936?

A. I did.

Q. To whom?

A. Fred Pagel and Dink McGowan.

Q. What were the orders you gave with reference to Reading car 20970 on the morning of December 31, 1936?

THE COURT: Was that the runaway car, Mr. Friedman?

MR. FRIEDMAN: Yes.

THE WITNESS: I gave him an order to move a car, I don't know whether it was a car in the boiler house, or a car of Steel; on that I am in the dark, I don't remember that. When I told him that, I said, "When you have that done, get that scrap car on the scales so I can weigh it when I came back," which is usually about an hour and a half.

BY MR. FRIEDMAN:

Q. I believe you already testified that the orders with reference to cars in your yard are given by you.

A. Yes.

Q. Are those orders given orally or in writing?

A. By word of mouth, only.

Q. By word of mouth, only; then there was no so-called drill slip in connection with this car 20970?

A. No; never is in the years I have been there.

Q. By the way, you say you are employed by the American Steel and Wire Company?

A. Yes.

Q. You said there never is a drill slip in connection with it?

A. No. The cars all have to pass my office. The cars have to pass my office empty and loaded; there is no need of it.

Q. Do you know where that car came from?

A. Worcester, Massachusetts, and was loaded with steel in rod form.

Q. And had been unloaded in the yard?

A. And had been unloaded in the yard by my men under my jurisdiction.

Q. On what date?

A. On the date it came in, the 26th,

Q. December 26th, 1936?

A. Yes.

Q. After that it was loaded with scrap to be shipped to Pencoyd, Philadelphia?

A. It was weighed light, and then weighed loaded.

Q. When did you weigh it light?

A. The next morning.

Q. When you say the next morning, you mean prior to December 31st?

A. 27th.

Q. The 27th of December, 1936?

A. Yes.

MR. FRIEDMAN: Cross-examine.

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*Cross Examination*

BY MR. GERNERD:

Q. Will you let me look at that book from which you refreshed your recollection?

A. You bet.

Q. It says Worcester, Mass. That means this car came from Worcester, Massachusetts, into your yard?

A. Yes, steel in rod form.

Q. Mr. Breisch and this man Pagel, and McGowan—were they employed by the American Steel and Wire Company?

A. No.

Q. Was this the engine of the American Steel and Wire Company?

A. No.

Q. Then this was a drill crew in the employ of the Central Railroad of New Jersey?

A. Yes, sir.

Q. And they took their instructions from their superior employers, didn't they?

A. Surely.

Q. Yes. Now, you said that you were gone about an hour and a half that morning after you had told Pagel and McGowan—

A. Pagel is the name.

Q. —to move that car 20970 on the scales, is that right?

A. Yes.

Q. Then you weren't around when this accident happened?

A. No.

Q. And you didn't see Mr. Breisch that morning?

A. No, sir.

Q. Didn't even see him after the accident?

A. No, sir.

Q. In this same yard there are other cars than the American Steel and Wire Company used in that yard and that are unloaded and rerouted?

A. Not in that yard, no.

Q. There are certain scrap yards there?

A. That's not in the Wire Company's yard.

Q. Is it adjoining?

A. Not adjoining, even.

Q. You mean to tell me that Aronsky's Scrap Yard, that the railroad tracks are not adjoining the tracks of the American Steel and Wire Company?

A. No, they don't adjoin.

Q. Then they run parallel in the same yard?

A. No.

Q. I show you Exhibit 2. Is this a part of your yard?

A. Yes, sir, this is our yard, and that is our first track; this is the Lehigh Valley track (indicating).

Q. Running into your yard?

A. No, not from here; it runs in our yard from here (indicating), but not here. This is the Valley main line.

Q. What is this over here? Is there a track over there (indicating)?

A. Yes, these are some of my cars out of the mill, loads and empties standing over here (indicating).

Q. Aren't Aronsky's over there (indicating)?

A. Over here (indicating).

Q. Let the jury see that.

A. Those are my empty and loaded cars out of the plant.

Q. That is a part of the Wire and Steel Company?

A. No, that is the Central Railroad.

Q. But it is in your yard?

A. No, this is our yard over here (indicating).

Q. Only that over there?

A. Yes, sir; we have nothing to do on this side of the Lehigh Valley Track.

Q. You have other cars coming in here to be put over and loaded along side of your buildings?

A. Yes, right in here (indicating); that is our track.

Q. They are brought from this track over here (indicating), over on to your track?

A. Yes.

Q. But you only have one track that you call your own in your yard?

A. No, from that first track back, everything there, from number 2 back, everything is ours, and we have four-ten of them.

Q. And other people have cars coming in that area, don't they?

A. No, not in our area.

Q. Then your cars that come in, come from different parts of the country?

A. Yes.

Q. Just as this car came from Massachusetts?

A. Yes.

Q. And they are shipped from your yard into other states, out to Ohio, Illinois, Texas?

A. Yes, but this very car wasn't shipped there.

Q. Answer my question.

A. Yes, they are shipped to anywhere, to their destination.

Q. You wouldn't know whether there was an order in that trainmen's hut or shed for Mr. Breisch?

A. I wouldn't know.

Q. You wouldn't know that?

A. Who else would put it there but me if there was one there?

Q. From whom Mr. Breisch gets his orders; he is conductor of this train crew.

A. He was that day, but he never seen me.

Q. You weren't there to give him orders?

A. No, nor did I leave any.

Q. How was he going to carry out his duties on that day when he was called up—

A. He had no orders; Pagel and McGowan had the orders.

Q. Neither one of them were conductor?

A. No.

Q. The conductor of a crew is in charge of that crew?

A. Absolutely.



Q. And the engineer and brakemen take orders from the conductor?

A. Absolutely, and they don't move unless the conductor is there, unless they want to, but they are not that bull-headed.

Q. Mr. Breisch testified that he was called up in the morning at quarter of six to report and take charge of this crew and engine, and when he got there you weren't there?

A. No.

MR. GERNERD: That's all.

THE COURT: Now, counsel, you asked him about the ownership, as I understood it, of the locomotive, and he said nothing about the cars. Did you mean to differentiate?

MR. GERNERD: I thank you, Your Honor.

BY MR. GERNERD:

Q. The locomotive belongs to the Central Railroad of New Jersey?

A. Yes, sir.

Q. To whom did this car belong to?

A. The Reading Railroad Company.

Q. The Reading Railroad Company?

A. As much as I know; it was a Reading car; I don't know who owns it.

Q. It was connected with the Central Railroad?

A. Yes, and the engine done the handling; they brought it in loaded, and took it out from me.

BY THE COURT:

Q. Your concern had no cars of its own?

A. No, we have no engine and no cars.

MR. GERNERD: That's all.



*Redirect Examination*

BY MR. FRIEDMAN:

Q. Just a moment. I show you a paper which I ask be marked Defendant's Exhibit A—

(A slip pertaining to car number 20970 was marked Defendant's Exhibit A.)

BY MR. FRIEDMAN:

Q. —and ask you if you ever saw that before. Just answer that yes or no.

A. Yes.

Q. Where did you first see that? What is it?

A. In my scale office; that is the scrap car involved.

Q. What car? What number?

A. 20970.

Q. Reading?

A. Reading 20970.

Q. Is that your scale ticket? Is this your signature on that?

A. Yes.

Q. That was weighed when?

A. Light weighed on the 30th of December.

Q. What year?

A. 1936; and heavy weighed December 31, 1936.

Q. After the accident do you know whether that car remained in the yard of the American Steel and Wire Company?

A. It did for an indefinite period; I couldn't tell you for just how long. The Central Railroad Company asked us to hold it in there.

Q. And then you shipped it where, if you did ship it?

A. Pencoyd, Philadelphia.

MR. GERNERD: Objected to.

BY MR. FRIEDMAN:

Q. Who did ship it out?

A. The billing clerks.

Q. To where?

A. Pencoyd.

MR. GERNERD: I object to any testimony to show the place when he testified the car was kept there an indefinite period of time and then shipped. I object to that testimony and ask it be stricken out; and it is not responsive.

MR. FRIEDMAN: I don't know, who would know better than this man?

THE COURT: It is already in evidence; what is the advantage of striking out this particular statement?

MR. GERNERD: All right.

BY MR. FRIEDMAN:

Q. You did say you are in charge of all of the cars in the yard of the American Steel and Wire Company?

A. Yes, sir.

THE COURT: The destination of this car was Pencoyd, Pennsylvania; that is the Pencoyd Company in Pennsylvania?

MR. FRIEDMAN: Yes, sir.

BY MR. FRIEDMAN:

Q. You are the one who gives the orders in the American Steel and Wire Company?

A. Yes.

Q. And you were on there prior to December 31, 1936?

A. Yes, sir.

Q. And you, alone, give those orders?

A. Yes, sir.

MR. FRIEDMAN: That's all.

Oscar Koehler—Recross

65

Oscar Koehler—Redirect

Oscar Koehler—Recross

*Recross Examination*

BY MR. GERNERD:

Q. When was that destination fixed, if you know?

A. How was that?

Q. When was that car routed to Pencoyd, Pennsylvania, if you know?

A. That I won't give you definite; I don't have that record.

Q. But it was long after the date of the accident?

A. Well, I would say two days; I believe the Central Railroad Company asked us to hold that car in there, the both of them that were involved, for their purpose that you find out here today.

Q. But it was after this accident?

A. Yes.

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*Redirect Examination*

BY MR. FRIEDMAN:

Q. You mean there was an examination made of the car?

A. Yes.

Q. Mr. Koehler, I have an additional question. That Reading car number 20970 did not leave your yard until it left for Pencoyd, is that correct?

A. That's right.

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*Recross Examination*

BY MR. GERNERD:

Q. Just a moment. How many days after this accident, if you know?

A. That I couldn't tell you.

Q. But it was some days after the occurrence of this accident?

A. It was a day or two, I would say.

MR. GERNERD: Alright, that is all

FRED H. PAGEL, having been duly sworn, was examined and testified as follows:

*Direct Examination*

BY MR. FRIEDMAN:

Q. Mr. Pagel, where do you live?

A. Mauch Chunk.

Q. Where do you work?

A. Allentown.

Q. For whom?

A. Central Railroad of New Jersey.

Q. How long have you worked for the railroad?

A. 47 years.

Q. Were you working for them on the morning of December 31, 1936?

A. Yes, sir.

Q. Do you know Mr. Breisch, the plaintiff in this case?

A. Yes, sir.

Q. Do you remember the morning the accident happened?

A. Yes, sir.

Q. That was on December 31, 1936. Were you working with Mr. Breisch on that morning?

A. He was there that morning, yes, sir.

Q. You and Mr. Breisch and Mr. McGowan made up one crew who worked in that yard?

A. Yes, sir.

Q. That morning, is that correct?

A. Yes, sir.

Q. Who got there first that morning, you or Mr. Breisch?

A. I got there, me and McGowan got there first.

Q. You and McGowan got there first; did you get any orders that morning with reference to this Reading car 20970?

A. Yes, sir.

Q. Who gave you those orders?

A. Mr. Koehler.

Q. Mr. Koehler, the man who was on the stand ahead of you?

A. Yes, sir.

Q. What time of day was it you got those orders?

A. Oh, I would say about half past six in the morning.

Q. When did Mr. Breisch first join you?

A. He comes in there at 7 o'clock.

Q. What did you do? What did you and Mr. McGowan do with reference to Reading car 20970 on the morning of December 31, 1936?

A. We were supposed to put that on the scale.

Q. For what purpose?

A. To be weighed.

Q. Who gave you those instructions?

A. Mr. Koehler.

Q. Were any other instructions given you before that?

A. We had to spot before that.

Q. You had to spot that other car out of the way?

A. No, sir, we spotted that on another track before we spotted this car.

Q. Do you remember the engine pulling this Reading car easterly towards the entrance of the Wire Mill just before the accident? Do you remember the coupling made with the engine and Reading car 20970.

A. Yes.

Q. Do you know who made that coupling, Mr. Pagel?

A. By Mr. McGowan.

Q. Did you see him make it?

A. No, sir, I wasn't there.

Q. Just before the accident how far east did the engine and the Reading car move to clear the switch?

A. East? We shoved west with that to get it on the scale track.

Q. Before that you moved in an easterly direction, did you not? Did the engine move in an easterly direction before that?

A. Oh, yes. We came down over what they call the lead to get on number 2.

Q. What were you about to do?

A. Get that car on the scale.

Q. You mean the Reading car?

A. Yes, sir.

Q. What must you do in order to get that car on the scale?

A. There are two cars there together. We had to shove it about ten feet to get in on the scale track. When McGowan coupled up, he gave the signal to the engine. I flagged, and made a cut, and he went back and came over on the scale rail.

Q. When the Reading car got loose from the engine did anybody try to put any blocks under it?

A. I don't know.

Q. By the way, was it wet or dry that morning?

A. It was wet.

Q. Were you present when the accident occurred? Did you actually see the accident?

A. I didn't see the accident, but he hollered for blocks, and the brakeman and I were under the Reading car.

Q. What kind of a car was this Reading car?

A. Gondola.

Q. Who was in charge of the yard of the American Steel and Wire Company?

A. Mr. Koehler.

Q. Is he the yard master?

A. Yes, sir.



Q. Is he the one person that gives orders with reference to the movements of cars in that yard?

A. Yes, sir.

Q. You take your orders from him in that yard?

A. Yes, sir.

MR. FRIEDMAN: Cross-examine.

*Cross-Examination*

BY MR. GERNERD:

Q. What does the conductor have to do with your drill crew? Isn't he in charge of the drill crew?

A. Yes, sir, he is in charge of the drill crew.

Q. Was Mr. Breisch in charge of the drill crew that morning?

A. Yes, sir.

Q. Are you the engineer or fireman?

A. Brakeman.

Q. You are a brakeman?

A. Yes, sir.

Q. You take your orders from the conductor of the crew, don't you?

A. And the yard master, when the conductor isn't there he tells us what to do.

Q. Mr. Breisch was there that morning?

A. Not when Mr. Koehler was there.

Q. No, but he was there when the movement of this car took place?

A. Sure.

MR. GERNERD: That's all.

*Redirect Examination*

BY MR. FRIEDMAN:

Q. By the way, did you tell Mr. Breisch anything about this Reading car, yourself?

A. No, sir.

*Stipulation*

MR. FRIEDMAN: That's all.

MR. GERNERD: No questions.

MR. FRIEDMAN: If the Court please, Mr. McGowan cannot be here. We have a doctor's certificate here.

MR. GERNERD: That is all right.

MR. FRIEDMAN: You are not raising any question about Mr. McGowan?

MR. GERNERD: No.

MR. FRIEDMAN: I have a doctor's certificate.

MR. GERNERD: That is all right, we have no objection.

THE COURT: You better put it on the record; just put your stipulation on the record; counsel does not raise any question about it.

MR. FRIEDMAN: It is stipulated and agreed that no objection of any kind is to be raised directly or indirectly because of the absence of Mr. McGowan. We have a doctor's certificate showing he is ill and unable to attend.

MR. GERNERD: We don't raise any objection to that whatsoever.

*Before*

Hon. Oliver B. Dickinson, J., and a Jury

Philadelphia, Pa., April 27, 1939

*SECOND DAY**Present*

Fred B. Gerner, Esq., and ~~David Getz~~, Esq., representing the Plaintiff.

Henry B. Friedman, Esq., representing the Defendant.

DEFENDANT'S EVIDENCE (Continued)

THE COURT: You may proceed whenever you are ready.

MR. FRIEDMAN: Mr. Kramer, take the stand, please.

EARL T. KRAMER, having been duly sworn, was examined and testified as follows:

*Direct Examination*

BY MR. FRIEDMAN:

Q. Mr. Kramer, where do you live?

A. 1030 South 7th Street, Allentown.

Q. How long have you lived in Allentown?

A. Forty-seven years.

Q. Mr. Kramer, by whom are you employed?

A. American Steel and Wire Company, at Allentown.

Q. Allentown, Lehigh County, Pennsylvania?

A. Yes, sir.

Q. How long have you been employed by the American Steel and Wire Company?

A. Twenty-eight years.

Q. You were then, of course, employed by the American Steel and Wire Company on December 31, 1936?

A. Yes, sir.

Q. In what capacity have you been working for the American Steel and Wire Company?

A. I have been working as checker in the shipping department, mailing clerk, and assistant billing clerk.

Q. What was your capacity on and after December 31, 1936?

A. Assistant billing clerk.

Q. Is your office there in that plant?

A. Yes, sir.

Q. Who was the yard master in December 31 for the American Steel and Wire Company?

A. Oscar Koehler.

Q. The gentleman who is here in court?

A. Yes, sir.

Q. I show you a paper, which I asked to be marked Defendant's Exhibit B—

(The shipping order referred to was marked Defendant's Exhibit B for identification.)

BY MR. FRIEDMAN:

Q. Did you ever see that paper before?

A. Yes, sir.

Q. What is that?

A. That is the bill of lading covering the movement of the car load of scrap.

Q. What car number?

A. Reading, 20970.

Q. By whom was that made?

A. I made that up.

Q. And are your initials on it?

A. Yes, sir.

Q. Where are they?

A. "ETK" on the lower left corner.

Q. When was it made up?

A. January 4, 1937, the date indicated.

Q. That is an order to ship Reading car 20970 from The American Steel and Wire Company to where?

A. Pencoyd, Pennsylvania.

Q. Over what road?

A. The Reading Railroad.

Q. Would that be entirely within the State of Pennsylvania?

A. Yes, sir.

Q. That car was filled with what?

A. Scrap iron.

Q. On or around December 31, 1936 was your com-

pany shipping any scrap iron to any place other than Pen-  
coyd?

MR. GERNERD: That is objected to.

THE COURT: I did not get the question.

(The question was repeated by the Reporter.)

THE COURT: I do not see the relevancy—

MR. FRIEDMAN: It is relevant to the question  
that Mr. Breisch seemed to think he got an order to  
ship it somewhere else.

THE COURT: To show it was shipped some-  
where else?

MR. FRIEDMAN: That is our purpose—to show  
where it was actually shipped.

THE COURT: I do not think it has any relev-  
ancy but—

MR. FRIEDMAN: We think it has for that rea-  
son, Your Honor.

THE COURT: I will sustain the objection and  
give you an exception.

BY MR. FRIEDMAN:

Q. When that Reading car 20970 came into your yard  
at the American Steel and Wire Company, prior to Decem-  
ber 31, 1936, did you issue any other order beside this one,  
in connection with that car?

A. No, sir.

MR. FRIEDMAN: Cross-examine.

MR. GERNERD: No questions.

MR. FRIEDMAN: That is all, thank you.

EARL A. ZEIGLER, having been duly sworn, was exam-  
ined and testified as follows:

*Direct Examination*

BY MR. FRIEDMAN:

Q. Mr. Zeigler, where do you live?

A. I live at Wescoesville, Route 1.



Q. That is near Allentown?

A. Near Allentown.

Q. By whom are you employed?

A. Central Railroad of New Jersey.

Q. How long have you worked for them?

A. Since August 7, 1916.

Q. You were working for them the latter part of 1936 and the fore part of 1937?

A. Yes, sir.

Q. Where?

A. At Race and Linton Streets, in Allentown.

Q. What office?

A. In the central freight office.

Q. The central freight office. What were your duties in the central freight office?

A. Waybilling clerk.

Q. Waybilling clerk?

A. Yes.

Q. Now, I show you a shipping order of the American Steel and Wire Company in connection with Reading car 20970, and which has already been marked Defendant's Exhibit B, and I ask, Mr. Zeigler, did you ever see that before?

A. Yes, sir.

Q. When?

A. January 4, 1937, 4 P. M.

Q. Did you get that in your official capacity and while working for the company?

MR. GETZ: Just a minute. We desire to interpose an objection for the reason that it is irrelevant. This refers to a document prepared and issued in January, 1937, several days after the alleged incident.

MR. FRIEDMAN: We must show the shipment, where this car went to.

THE COURT: There is no controversy over that?



MR. FRIEDMAN: There is no controversy over that.

MR. GERNERD: There is no question that this car was shipped four days later—

MR. FRIEDMAN: Shipped on January 4 to Pencoyd, Pennsylvania.

MR. GERNERD: And this accident happened December 31, 1936. How can we be bound by something that was done four days later?

THE COURT: We are not discussing that. There is no controversy over the fact that the destination of this car after it was loaded, was Pencoyd, Pennsylvania?

MR. GETZ: After December 31st—where they routed it, there is no controversy about that.

MR. GERNERD: No controversy about that.

THE COURT: There is no use multiplying the proof about that.

MR. FRIEDMAN: I realize that. Then I wish to offer in evidence defendant's exhibit—

(The waybill referred to was marked Defendant's Exhibit C for identification.)

BY MR. FRIEDMAN:

Q. After you got the shipping order, did you make out a freight waybill?

A. Yes, sir.

Q. Was that freight waybill made out under your direction?

A. Yes, sir.

Q. And was that in connection with Reading car 20970?

A. That was the waybill and car traveling car to Pencoyd.

Q. And was the car actually consigned and delivered to Pencoyd, Pennsylvania?

*E. A. Zeigler—Cross*  
*E. A. Zeigler—Redirect*

A. Yes, sir.

Q. And it was received at Pencoyd, Pennsylvania, on what date?

A. January 9, 9 A. M.

Q. Of what year?

A. The stamp does not show—it was received in 1937.

Q. And that waybill was issued as a result of the shipping order issued by the American Steel and Wire Company?

A. Yes, sir.

Q. Is that your initial on Defendant's Exhibit B?

A. Yes, sir.

MR. FRIEDMAN: Cross-examine.

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*Cross Examination*

BY MR. GETZ:

Q. Do you know where Pencoyd is?

A. Yes, sir.

Q. Where is that?

A. On the Reading Company, on the outskirts of Philadelphia.

Q. You do not know of your own knowledge whether this car arrived at Pencoyd?

A. Yes, sir, that waybill shows it. That was the waybill that accompanied the car to Pencoyd.

MR. GETZ: That is all.

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*Redirect Examination*

BY MR. FRIEDMAN:

Q. Are the waybills returned to you after the shipment is received at the other end, for instance, this waybill, Defendant's Exhibit C?

A. No, they are not returned.

MR. FRIEDMAN: That is all.

*Recross Examination*

BY MR. GETZ:

Q. But, there is no question about the fact that this was done in January, 1937?

A. That is the date I received it.

Q. And that is the date that this original bill of lading was prepared?

A. Yes, sir.

MR. GETZ: That is all.

MR. FRIEDMAN: That is all, thank you, sir.

MR. FRIEDMAN: At this time we would like to offer in evidence Defendant's Exhibits A, B, and C.

MR. GETZ: They are objected to. They are documents made several days after the alleged accident.

THE COURT: I do not understand what they are so I cannot tell you—

MR. FRIEDMAN: Exhibit A is the weigh bill of Reading car 20970 made out on December 31st.

THE COURT: Merely to show the shipment?

MR. FRIEDMAN: That is to show the actual weighing of the car.

THE COURT: What value does it have for the jury?

MR. FRIEDMAN: We feel that for our record that is important, if Your Honor please.

THE COURT: All right. What is the other?

MR. FRIEDMAN: Exhibit B is the original shipping order made by Mr. Kramer, the clerk for the American Steel and Wire Company, with reference to this particular car of scrap, Reading car 20970, showing it was shipped over the route of the Reading Company to Pencoyd.

THE COURT: That is merely to show the shipment?

MR. FRIEDMAN: That is right.

THE COURT: And what is the third?

MR. FRIEDMAN: The third is the waybill.

THE COURT: That is to show the shipment?

MR. FRIEDMAN: That is to show the shipment and the receipt of the shipment at Pencoyd.

THE COURT: All right. I do not see the relevancy, but I will admit them and give you an exception.

(Scale ticket card was marked Defendant's Exhibit A, was received in evidence.

The shipping order, marked Defendant's Exhibit B, was received in evidence.

The freight waybill, marked Defendant's Exhibit C, was received in evidence.)

MR. FRIEDMAN: Now, if the Court please, at this time we again move to strike out Plaintiff Breisch's testimony as found in the last part of his direct testimony with reference to his statement about interstate commerce, for the reason that it is incompetent, conjectural, and a conclusion, and not supported or warranted by the facts.

THE COURT: Have you already moved that?

MR. FRIEDMAN: I do not think I have.

THE COURT: You made use of the word "again". If you have already done it, it is no use repeating it. You are doubtful?

MR. FRIEDMAN: I am doubtful.

THE COURT: And want to make sure?

MR. FRIEDMAN: May I have a ruling?

THE COURT: I do not know what the testimony is that you are moving to strike out. You better specify what you are moving to strike out.

MR. FRIEDMAN: Yes, sir. I move to strike out the question and response thereto, as asked by Mr. Gerner, wherein he asked in redirect examination.

"Q. At the moment that interstate cars were coming from different sections?"

He asked the witness Breisch that. I submit that witness Breisch is not competent to testify on that point.

That calls for a legal conclusion on the part of Mr. Breisch.

THE COURT: And the other motion is what?

MR. FRIEDMAN: I move to strike out Plaintiff Breisch's testimony where reference is made to a memorandum or order purported to have been found by him in the train men's shanty, as I believe it has been referred to, for the reason that this testimony is incompetent—it is secondary—and there was no basis laid for such testimony, and no facts have been shown which can make this testimony binding on the defendant, and there is no evidence that such order or memorandum was issued by or on behalf of the defendant.

THE COURT: Motion to strike out—what have you to say?

MR. GETZ: We feel that is a question of fact for the jury.

THE COURT: Take the reference to the movement of these cars, if I follow it, it means no more than an expression of opinion by Breisch. The statement by Breisch that cars did move in interstate commerce over these tracks. What bearing does it have?

MR. GETZ: And he also stated—

THE COURT: I know, but there is a motion to strike out before us—what importance is it whether it is in or out?

MR. GETZ: It may have a bearing.

THE COURT: On what?

MR. GETZ: On the question of intra and interstate commerce.

THE COURT: I assume there is no doubt that several witnesses testified to it. The Central Railroad of New Jersey operates, at least, between the states of New Jersey and Pennsylvania. What's the use of talking about it? There is no doubt but what it does. But the motion to strike out, are you objecting to it?

*Colloquy*  
*Offer—Compensation Act of 1915*

MR. GERNERD: Yes.

THE COURT: I will deny the motion and give the other side an exception.

MR. FRIEDMAN: Exception to each of our motions?

THE COURT: They have not answered as to the other.

MR. GERNERD: The memorandum. We object to it, Your Honor.

THE COURT: I will deny the motion to strike out the testimony as to this slip, or whatever you call it, and exception to the defendant.

MR. FRIEDMAN: Now, if the Court please, will the Court take judicial notice of the Pennsylvania Workmen's Compensation law? I have the volume here, (producing same).

THE COURT: We are trying this case under the Pennsylvania law?

MR. FRIEDMAN: Yes, sir.

THE COURT: And we are bound to take notice of it.

MR. FRIEDMAN: I do not want to be left high and dry—

THE COURT: I understand. If you think it is necessary to formally offer it in evidence, make your offer.

MR. FRIEDMAN: Then, if the Court please, I offer in evidence the Pennsylvania Workmen's Compensation Act, 1915, and supplement, P. L. 736.

THE COURT: Give me the part of it—it is a long act. In your judgment, give me the part of it that is pertinent.

MR. FRIEDMAN: Of course, I feel that the entire act, as an act, is pertinent.

THE COURT: I know.

MR. FRIEDMAN: But, the particular reference, article 3.

THE COURT: That you want me to see.



MR. FRIEDMAN: Article 3, section 301, section 303.

THE COURT: Mr. Friedman, probably you can save me the trouble of looking at it if you will tell me what it is.

MR. FRIEDMAN: That is the one that the employee made—

THE COURT: May or must?

MR. FRIEDMAN: That he shall be bound by the Workmen's Compensation Act unless he shall have done certain things.

THE COURT: That is what you might call a negative opposition.

MR. FRIEDMAN: It is really that he takes the provisions of the Act unless he notifies the other party in writing.

THE COURT: That is purely a question of law. I better reserve ruling on it anyhow—

MR. FRIEDMAN: That is right.

THE COURT: —rather than give an offhand opinion about it.

MR. FRIEDMAN: And in Section 302—

THE COURT: Your point is that the Pennsylvania law has provided a method or means or system of Workmen's Compensation, and every man who is hurt in the employ of another is, in law, taken to have accepted that act unless he gives notice to the contrary?

MR. FRIEDMAN: The act uses the word "conclusively" in Section 302.

THE COURT: Unless he gives notice?

MR. FRIEDMAN: That is right.

THE COURT: I get your point, and we will take the verdict of the jury subject to that point of law.

Now, is there anything in rebuttal?

MR. GERNERD: No, sir.

THE COURT: Go to the jury.

MR. FRIEDMAN: There is something else, in addition if the Court please.

Now, if the Court please, at this time the defendant moves for a dismissal of the complaint, and it again renews its motion for a directed verdict in its favor for the reasons already given at the close of Plaintiff's case, and also for the following reasons:

Plaintiff has failed to establish any cause of action against the defendant.

Plaintiff has failed to establish the cause of action alleged in his complaint.

Plaintiff has failed to establish that there was any negligence on the part of defendant which was the proximate cause of his injury.

Plaintiff's evidence shows that his own negligence contributed to the injuries.

Plaintiff's injuries were the result of his employment, which was open and obvious, and which the plaintiff assumed.

Plaintiff has not proved any facts which would give this Court jurisdiction of the cause of action.

Plaintiff cannot recover under the Federal Employee's Liability Act because he has failed to adequately prove that he and the defendant company were engaged in interstate commerce at the time that he was injured and in connection therewith.

THE COURT: Mr. Friedman, I understand your motion—

MR. FRIEDMAN: I have two more.

THE COURT: —would be to dismiss the complaint. Now, that must be for facts appearing in the complaint, and you have given, among your reasons, several things which grew out of the evidence.

MR. FRIEDMAN: When I made the motion I said "for the reasons already given", and I am now making a motion for directed verdict.

THE COURT: Directed verdict—all right.

MR. FRIEDMAN: There can be no recovery by the

plaintiff under the Safety Appliance Act, because he has not established facts that would bring him within those acts.

There can be no recovery because plaintiff's sole remedy, if any, is under the Workmen's Compensation Act of 1915 and its amendments.

THE COURT: Well, are you ready to go to the jury?

MR. GERNERD: Yes, sir.

MR. FRIEDMAN: As to the Safety Appliance Act, the plaintiff failed to show his engagement in interstate commerce at the time he was injured.

THE COURT: Well, are you ready to go to the jury?

MR. FRIEDMAN: May I have a ruling?

THE COURT: I thought you agreed that the Court should reserve the law defense. I think that is the sensible thing for you to do—for both sides. If you want a ruling I will give you a ruling and—

MR. FRIEDMAN: I would like to have a ruling.

THE COURT: I will reserve the point at this time, and save myself the trouble of looking at the act.

MR. FRIEDMAN: Yes, sir.

THE COURT: Go to the jury.

(Mr. Gernernd argued the plaintiff's case to the jury. Mr. Friedman argued the defendant's case to the jury. Mr. Gernernd argued to the jury in rebuttal.)

## V.

## CHARGE OF THE COURT

Dickinson, J.

Members of the Jury; I am not altogether sure that you have, or anyone could get a clear idea in this case of what lawyers call the case and defense. I want to try to make clear to you what the question is which you are to decide. It is a matter of common sense and a proposition that I am prone to bring to the attention of the jury that when a jury has anything to decide, a question to answer, we should get clearly in their minds, first, what the question is to which the answer is desired.

Let us see if we can get a clear idea of what this case really is. We have here an employer and an employee. The Central Railroad of New Jersey was the employer. It is answerable, as is every employer, to the law; it has its duty to perform, and if it fails of that duty it is answerable as precisely as any other employer is.

Now, what is the duty of an employer. The duty is to provide the men who work for them with a reasonably safe place and reasonably safe appliance with which their work is to be performed; that is, a safe place in which to work and a safe appliance with which to do their work. If an employer fails in that duty he is answerable for any damages that directly flow therefrom.

So that the question in this case—and this does not differ from any other case—the question in every case is whether or not the employer did fail in that duty, and that is the question that you have before you.

Now, a great deal has been said about a slip. I do not recall that the evidence discloses to you what was on that slip, and if it has any bearing, in your minds, upon the question which you are to decide you are, of course, to attach to it any significance that you think belongs to it. But, so far as I am concerned I do not see that it has any bearing whatever on the real question here.

Now, all cases of negligence, and you understand this is a case, what lawyers call a case of negligence. All cases of that kind divide themselves into three classes and belong to one or the other, or perhaps two of those classes. You have the case of what is called an inevitable accident. Somebody is injured because of a happening for which nobody is to blame, and of course, if no one is to blame the defendant on trial, whoever he or it may be, is not answerable. That is one type of case. You have another type of case in which you are able to find that the injury resulted from negligence, as lawyers call it, or to what in the vernacular we call fault. A finding may be made that the accident was due to the fault of the defendant on trial, and if it is, of course, you have the very easy conclusion, that the defendant is answerable for the consequence of its fault. Now, you have a third type, in which the same injury has been received, under precisely the same circumstances, and the finding is that the injury was due to the fault of both parties concerned. That is, in the trial of the case if it is the fault of both of the plaintiff and the defendant, and, if it is, I say to you what all of you already know that the law of Pennsylvania is that if the party injured—the plaintiff in the case—has himself or herself been guilty of any negligence, or negligence, which in any degree contributed or helped to bring about the injury which he had received, he cannot recover from the defendant, because the law of Pennsylvania is that between what



lawyers call joint tortfeasors—if both are to blame—neither can recover from the other.

It is for you to determine to which of these classifications this case belongs.

The plaintiff urges you that the injury that the plaintiff sustained was due to the fault or negligence of the defendant; and that the negligence consisted of this: That it failed to provide the employee, that is, Breisch, the plaintiff in this case, with a reasonably safe place in which to work and safe appliance to aid him in that work; and that the fault of the defendant was that this car upon which Breisch was working was provided with a defective brake. Now, it is for you to determine whether or not that had anything to do with the bringing about of his injury.

Now, what is the situation. Here is a conductor who saw this car running—using the expression not alone of counsel but, as I recall, of several witnesses,—“running wild”. That does not necessarily mean that it was running fast, but it means it was running without anybody directing its movement; it was running itself, and was running “wild” in that sense. There was no grade, or a very slight grade, at that point, so that the car was moving at a slow rate of speed, estimated at two and one-half to three miles an hour. You can compare that with the ordinary speed of a person walking at a fairly vigorous pace. If they are a vigorous walker they will walk approximately at the rate of four miles an hour. So you know that this car was moving at a less rate than that which a person walking would make use of. So that it was not “wild” in any sense as to the speed and that in itself dangerous. But, there was danger of a collision, and the plaintiff in performance of what he deemed to be his duty jumped upon that car, moving at that slow rate of speed, for the purpose of stopping it in order to avoid the danger of a collision.



That was his evident purpose—he could have had no other. The means of stopping it was the brake. It was a hand brake, and he applied it. You saw him upon the stand. Evidently, an unusually husky individual before he was injured, possessed, as you can see, of ample strength. He had had, I do not recall how many years, but something like thirty-nine years' experience in railroading, a part of which time had been devoted to braking, and you can, of course, infer from that that he understood how to apply a brake, and could properly and skilfully apply it. Now, he applied it, he said, not once, but if it did not work, he applied it a second time—at least a number of times more, and he could not make it work. The result was a collision. That collision threw him off his balance, and hence, the injury that he sustained.

Now, what is the question. Obviously, the question for the jury, and really that is the only controlling question in the case, is whether or not that brake was in a workable condition. That is the question you have to decide.

Now, what is the evidence. The evidence is that Breisch, the plaintiff in this case,—you had him under your observation—you had the opportunity of what in the vernacular is called “sizing him up”; you could determine what type of man he is, and your judgment would react at once to the extent to which you could place credence in his testimony. He told you that that brake did not work.

One witness, and as far as I recall only one witness, for the railroad company has told you that he tested that brake very shortly after this occurrence, and he found the brake in what he described as “one hundred per cent condition”. That means it was perfect as a brake, and that it worked and would work. When he was asked to explain how this happened, and his answer—there is only one inference to be drawn from it, and that is, as he viewed it, the plaintiff

in this case was mistaken either in the fact that he did try to apply the brake, or that he applied it so unskillfully that no brake would work. Now, there is a question for you to determine. You have the testimony of the witnesses for the railroad company that that brake was in good condition, "one hundred per cent" condition as he described it, and you have the testimony of Mr. Briesch that he applied that brake, not once, but at least twice, and it would not work. If it would not work and did not work, it was not workable, that is sure; and you have the testimony of the other witness that he tested it, and it was workable. Now, it is for you, as twelve sensible women and men to determine that simple fact: Was that brake in workable condition or was it not. As far as I can see, aside from the question of damages, that is the only question you have to decide in this case.

Now, there is a defense, what we all recognize to be a real defense, which the defendant in this case sets up, and it may be a perfectly good legal defense, and that is this: If a man is injured by the negligence of another, as I have explained to you, he has what the lawyers call a right of action, he has a remedy for his injury, and that remedy is to sue the party who was in fault and recover his damages. The railroad company sets up that under the provisions of a comparatively recent law in Pennsylvania, the plaintiff no longer has that right. He cannot sue for negligence but he must pursue the remedy which is given under the name of, as we all understand it, the Workmen's Compensation law. Now, that, you see, is purely a question of law. We cannot ask you to determine that, and we do not determine it at this time, and we reserve that question, and after your verdict has been received, if it is a verdict for the defendant, why, that is the end of the case; but, if it is a verdict for the plaintiff, it will be taken subject to that question of law,—whether or not the plaintiff has a right to

sue the defendant for negligence, notwithstanding the provisions of the Workmen's Compensation Act.

Something was said in the course of making a motion by counsel for the defendant that the plaintiff in this case was guilty himself of some degree of negligence which contributed to the injury which he had received. That is to say that he himself was at fault. Now, I have already told you that the law of Pennsylvania is that if such is the fact then a plaintiff cannot recover for an injury which is due wholly or in part to his own negligence; and it is for you to determine whether the plaintiff in this case has been guilty of what lawyers call any contributory negligence.

You will recall I asked counsel for the defendant, directing his attention to that feature in the case, and asked him if he cared to explain to the jury in what respect, in his view of it, the plaintiff had been guilty of negligence, but, in the exercise of a judgment which belongs to him he said he did not care to discuss that question. So, you have not had the benefit of any discussion on it. Nevertheless, it is in the case and it is for you to pass upon. For illustration, if this man was standing in a place of safety outside of this car, if he stood there, he would not have been hurt. That is clear enough. In the exercise of what he thought to be his duty he jumped on that slow moving car for the purpose of stopping it,—was he guilty of any fault in doing that? Now, that is one suggestion of possible fault. The other may be, and I do not know because we have not had the benefit of a discussion of it, the other may be that in applying this brake he was reckless, careless or at fault, and in maintaining his position on this car it was through his own fault that he was thrown off by the jolt or of this jar. As I have said, I do not know just what the averment of negligence on his part is, but you are to consider all the facts in this case and if your finding

is that the plaintiff contributed in any degree to the injury which befell him, that is, a fault which contributed to bring about that injury, then he cannot recover. But, of course, if in your judgment he was not guilty of any such fault then that defense goes "by the board";

Now, that leaves in the case the question of damages. I have, of course, had occasion thousands of times to instruct juries upon that question, and I have fallen in the rut or habit of saying to every jury that when you come to a question of figuring in dollars and cents you want to call to your help the best judgment which you possess for there is not time in which level headed judgment is more imperatively required than it is when you are considering a matter of dollars and cents.

Now, the plaintiff is entitled, primarily, to all expenses to which he has been subjected. Of course, that goes without saying and you have evidence of what his expenses were. He is entitled to compensation for the time that he lost as a result of his injury, and you have had evidence as to that. The measure of what money he lost from loss of time is what you find to be his average rate of compensation for his labor. That is to say, you figure as best you can—and you can do that probably without much effort,—what he, in all probability, would have earned had this injury not befallen him, and for the time in which he has been deprived of his leg. He has lost a leg. That is going to affect not only his past or present earning capacity, but affect him in the future. You should take into consideration the man's age. He is about sixty-three years of age, as I understand. He has fully recovered in the surgical sense, that is, after the surgeons have done for him all they can do, and stump of his leg heals to such an extent that he can wear an artificial leg. To what extent will that condition in which he is left—of course, he cannot recover from

it,—that will reduce his earning capacity in the future. Now, you determine that as best you can.

Now, there is another element which juries are not only permitted to consider but which the law commands them really to consider, and that is what is called pain and suffering. Now, as counsel has said to you, and very fairly said to you, and what your own common sense would say to you, you cannot put a dollar mark upon the pain or upon suffering. You cannot say, here is a person who suffered very slight pain and we will put a value of so much upon that, and here is another person who has endured agonizing pain and we will put a higher valuation upon that. You cannot do that, and the law does not require of you impossibilities.

What does the law mean that you are to consider pain and suffering. It means simply this, it may be of practical help to you or it may not be of much help, but it is the best anyone can do for you, that when you are considering the element of damages, the injury that the man sustained, his experience in the hospital, his condition as it is at present, you are to consider that during that time he endured pain and suffering to the extent to which you find it to exist, and you are to take that into consideration in fixing the amount of your damages. You have in mind the fact, if it be such, that the man has sustained pain and suffering and the extent to which it has been visited upon him. And, after all, members of the jury, you see that the appeal comes back to your hard common sense judgment in fixing damages. Do the best with it that you can. Reach a conclusion as to the damages which you think would be fair and just to the plaintiff, if your verdict should be in his favor; and likewise fair and just as far as the defendant is concerned. In other words, fix the amount which meets the approval of the combined judgment of you all.



Now, the points as far as submitted, as far as I have covered them in this charge, and in so far as they are affirmed, they are affirmed; and in so far as they are negatived or modified, they are so negatived or modified and exceptions are allowed to the respective parties.

When your verdict is taken, let me give you a word as to the formalities. You will be asked whether or not you have agreed on your verdict, after you have agreed, of course, and in answer to that, your answer being that you have so agreed, the next question will be, "How do you find; do you find in favor of the plaintiff or for the defendant?" You answer that question accordingly.

If your judgment in this case is that under all the evidence this defendant was guilty of no act of negligence on its part, or if you find that the plaintiff contributed to his own injury, and you find in favor of the defendant, you will say, "We find in favor of the defendant" and you need say no more.

If, on the other hand, your verdict is in favor of the plaintiff, you then say, "We find in favor of the plaintiff and assess the damages at the sum of so much."

And, as I have explained to you, your verdict will be taken subject to the defense set up under the Workmen's Compensation Act, and the Court will pass upon that as a question of law in due course. With that you have nothing to do, and as far as the development of this case is concerned no one knows how that question will be determined in the future. The advantage of your verdict is that if the question is also determined in favor of the plaintiff, we will have your verdict which will end this case. Otherwise, if the Court passed upon that question now and was guilty of error in the way in which he passed on it, it might necessitate trying this whole case over again. So, you see



the practical advantage in taking your verdict subject to the point of law reserved.

You may take the case and dispose of it, after counsel have had an opportunity to except to the charge.

MR. GERNERD: I have no exceptions.

MR. FRIEDMAN: With the permission of the Court I would like to except to the charge of the Court in so far as it failed to affirm the three points submitted on the part of the defendant. Also, in so far as the charge did not take into consideration the plaintiff's theory of the case of the application of the Employer's Liability Act and the Safety Appliance Act with respect to interstate commerce.

THE COURT: I admit my passing over that—perhaps I should explain that to the jury—but, my passing over that is in your favor.

Members of the jury, there has been some suggestion in this case about the question of interstate commerce. I do not know how much you know on that subject but, if you know anything, you know more than anybody else knows. Of course, we know this: that railroads are engaged in, really, as this evidence in this case would warrant you in finding, and is undoubtedly the fact, are engaged both in interstate, as it is called, and intrastate, as it is called, business. In other words, it does business that extends across state lines, and it does business that is wholly within the state lines.

I say to you that under the evidence in this case there is nothing which would justify you in finding that this particular movement of this particular gondola car was a movement in interstate commerce. Under the evidence it was clearly an intrastate movement, so that you have nothing really to do with the question of interstate commerce.

I did not say anything about it because I assumed from the fact that I did not say anything about it that it had nothing to do in the case, but, as counsel very properly called my attention to it, I instruct you that the question of interstate commerce has, under the evidence in this case, nothing to do with it.

Now, you may take the case and dispose of it.

I assume counsel will enter into the usual agreement?

MR. FRIEDMAN: About the taking of the verdict?

THE COURT: I assume that the stenographer may enter the usual stipulation. If the jury should ask for further instructions we will not require counsel to be in attendance, and instructions may be given in the absence of counsel with allowances of exceptions. And, if the Court should not be in session when the jury have agreed on their verdict, in order that the jury may not be called upon to wait, the Clerk may take the verdict with the same effect as if taken in open court.

MR. GETZ: We would like to enter an objection to that portion of the charge to the jury—may I enter an exception to the latter portion of the instructions to the jury, namely, the instruction regarding interstate commerce.

MR. FRIEDMAN: And please note that was taken after the jury left the room.

THE COURT: Oh, Mr. Friedman, oh, now—

MR. FRIEDMAN: If the Court please, I am the one who is going to have the burden in this case, not Mr. Getz.

THE COURT: The jury had not retired when the objection was taken, so that disposes of that.

MR. GETZ: Now, that the jury is out, the defendant contends that the Workmen's Compensation—

*Charge of the Court  
Defendant's Points  
Verdict  
Stipulation*

95

THE COURT: That he did not make application, and he cannot do it now because it is too late.

MR. GETZ: But, so far as the Workmen's Compensation case is concerned—

MR. GERNERD: Oh, let it go, do not argue any questions of law now.

(The defendant submitted the following points for charge:

“The learned Trial Judge is respectfully requested to charge the jury as follows:

1. Under all the evidence in this case, your verdict must be for the defendant.

2. Under the law in this case, your verdict must be for the defendant.

3. Under the evidence and the law in this case, your verdict must be for the defendant.

(s) Henry B. Friedman  
Atty. for Defendant”)

(The jury returned a verdict for the plaintiff in the sum of \$12,000.)

**STIPULATION**

It was agreed and stipulated by and between counsel for the respective parties that if the Court should not be in session when the jury returns with their verdict, the Clerk of the Court may take the verdict with the same force and effect as if it were taken in open court; and that if the jury should return for further instructions, the Court may give the jury further instructions in the absence of counsel, with the allowance of an exception to each side to what is

said; and that if there are any exhibits or papers, which the jury desire to have sent out to them, they may be sent out.

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VI.

STIPULATION AS TO TESTIMONY  
(Filed Oct. 10, 1939)

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It is hereby stipulated and agreed by and between the undersigned that, subject to the approval of the Court, the following portions of the record of the minutes taken at the trial of the cause need not be printed in the transcript of record herein:

1. The exhibits as found on pages 32 to 42, inclusive, of the minutes.
- 2.. The testimony of the witness, Dr. Charles H. Muschlitz.
3. The testimony of the witness, William Sheridan.
4. The testimony of the witness, Thomas J. Roth.
5. The testimony of the witness, Fred J. Gibson.
6. The testimony of the witness, Charles W. Schwarz.
7. The testimony of the witness, J. D. Young.
8. The opening address of counsel for plaintiff.
9. It is also stipulated and agreed that the said witness, William Sheridan and Thomas J. Roth were called as witnesses for the plaintiff and testified to matters concerning defective brakes and couplings in connection with the accident; and that the witnesses, Fred J. Gibson, Charles W. Schwarz, and J. D. Young were called by defendant and also testified as to matters concerning brakes and couplings.

(s) FRED B. GERNERD,  
*Attorney for Plaintiff.*

(s) HENRY B. FRIEDMAN,  
*Attorney for Defendant.*

September 22, 1939.

VII.  
JUDGMENT

(Filed April 27th, 1939)

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Before Dickinson, J.

And now, to wit: April 27th, 1939, in accordance with the verdict, it is ordered that judgment be and is hereby entered in favor of Plaintiff, Howard E. Breisch and against the Defendant, The Central Railroad Company of New Jersey, in the sum of Twelve Thousand (\$12,000.00) Dollars, with costs.

BY THE COURT:

Attest: GILBERT W. LUDWIG,  
*Deputy Clerk.*

## VIII.

## DEFENDANT'S MOTION FOR JUDGMENT

(Filed May 3, 1939)

And now, May 2, 1939, the defendant, through its attorneys, Aubrey & Friedman, Esqs., moves the Court to have all the evidence, taken at the trial of this case, duly transcribed, certified, and filed so as to become a part of the record; and, having made a timely motion for a directed verdict and having presented a point for binding instructions, and which motion and point were not granted, and the determination of the legal questions thereby raised having been reserved, defendant moves to have the verdict and the judgment, heretofore rendered in favor of the plaintiff, set aside and to have judgment entered in favor of the defendant on the whole record and in accordance with defendant's motion for a directed verdict.

AUBREY &amp; FRIEDMAN,

By: HENRY B. FRIEDMAN,

*Attorneys for Defendant.*



IX.  
OPINION

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Sur Rule for Judgment N. O. V. &c.

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Argued May 19th, 1939

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(Filed June 8th, 1939)

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Dickinson, *J.*

Leave was given to submit supplemental Briefs, which we now have.

Care must be taken in a case such as this not to confuse two wholly different things. The risk of confusion arises out of the dual nature of our citizenship and consequent allegiance and subjection of the laws of two sovereigns. This is a unique feature of our form of Government. Nothing like it had before existed. The feature consists in this. The United States is a sovereign State. The several States are likewise sovereign. We are citizens of the United States, and as such owe it allegiance and subjection to its laws. We are likewise citizens of the State in which we reside owing to it like allegiance and subjection to its laws. The before unheard of proposition was that the same person should at one and the same time be the subject of two different sovereigns. How was this possible? The seeming unsurpassable obstacle was met, by the framers of our Constitution, by the simple expedient of having each sovereign consent to its subjects becoming also the subjects of the other. The United States and the several States so agreed by the Constitution. This however only half solved the problem. How was a conflict of sovereignty and of laws to

be avoided? This was accomplished by another simple expedient. The United States and each State were recognized to possess and to retain all the powers of independent sovereigns but they, again by the Constitution, agreed upon what sovereign powers the United States should exercise and which the several States should not. The power to regulate interstate commerce was committed to the United States. Its power over it is supreme and exclusive. In the exercise of this power it might pass such a law as is embodied in the Interstate Railroads Act and in the Appliance Act. This much is clear. As the individual citizen is subject to the dual allegiance above outlined, so in actual fact a railroad might be engaged both in interstate and intrastate commerce. It thus became necessary for the juridical power to define the limits within which the interstate power of the United States could constitutionally be exercised. Conceivably it might have been exercised in all cases in which a railroad company was engaged in interstate commerce. The first Act on the subject so provided. It was however held to be unconstitutional because it extended beyond the limits of interstate transactions.

The second Act was upheld because it was so restricted, and it was finally determined that the Acts of Congress applied or did not, according to the fact of whether the particular transaction, with which the case concerned itself, was interstate or intrastate.

New York vs. Bezie, 284 U. S., 415.

It may perhaps be regretted that a great Constitutional question is thus made to turn upon what might be and often is and indeed is the case here, a pin point fact. A carload of freight is transported into a State from a point beyond the State line. It is intended for further shipment to another point within the State, and in the meanwhile is hauled to where its weight can be taken. A man is injured

during the trip to the scales. Is this an interstate or intrastate movement? However the fact finding may be, the adjudged cases have determined for us that Congress may give a new cause of action or modify an old one in interstate transactions, but such laws have no application in intrastate cases.

The question does not arise in the motion before us because the Trial Judge instructed the jury that there was no evidence from which the jury could find that the plaintiff had suffered his injuries while or when engaged in interstate commerce. The cause of action given by the Acts of Congress is in consequence out of the case. An injured plaintiff may however have a good cause of action under the State law although none under the law of the United States. Such is this case. The District Court, as a Court of the United States, have venue jurisdiction to determine the case because of the diversity of citizenship of the parties and the sum in controversy. This means however that the case is to be determined as a State case and by its laws. Has then the plaintiff a cause of action under the law of Pennsylvania? A railroad employee does not cease to be an employee by changing the employment from interstate to intrastate. Defendant may be liable for the consequences of a defective brake. This would be however because of its negligence and not because the use of a defective brake was in violation of a Safety Appliance Act regulating interstate commerce. The two things should not be confused.

It is in effect conceded that the plaintiff would have a cause of action under what we know as the common law. It is urged however that the State of Pennsylvania has taken away from injured employees all right of action for damages for negligence, and has substituted for it a wholly new cause of action given by the Workmen's Compensation Acts. Whether this is true becomes the sole and only question in the cause and to this we limit the discussion. We

have the judicial power to determine this question in favor of the defendant, notwithstanding the verdict for the plaintiff, because we expressly reserved this point.

What answer then does the law of Pennsylvania make to this question?

The argument-addressed to us by counsel for the plaintiff obscures the real question by coupling it with the question of a violation of the Acts of Congress. Had the plaintiff been injured while engaged in an interstate movement of the car, the Safety Appliance Acts would undoubtedly apply. Inasmuch however as he was injured in an intrastate movement the Acts of Congress are out of the case except for such bearing as they may have on the question of negligence.

As before stated, it is conceded that the plaintiff has a cause and a right of action under the law of Pennsylvania unless the Workmen's Compensation Acts have taken away the common law right by substituting for it another. This question is, as we have further said, one of Pennsylvania law.

Counsel for the defendant has likewise coupled with his discussion of this question that of the other question of whether one injured in an intrastate transaction could maintain an action based upon the Acts of Congress. This latter question is not in the case because the jury was given binding instructions on this point. The only question, as we have already several times stated, is that outlined as the only question.

The question and the case, turns upon the construction given to the Pennsylvania Act of 1915, P. L. 736. That Act provides that "in every contract of hiring. \* \* \* it shall be conclusively presumed that the parties have accepted the (provisions of the Workmen's Compensation Act) and have

agreed to be bound thereby" &c. The Act has been under discussion in a number of Pennsylvania cases and similar Acts in other States have been discussed in cases in the Courts of those States and in the Courts of the United States.

The interpretation given the Acts of other States have not been uniform and perhaps not consistent. They do not directly apply to the Pennsylvania Statute and are helpful only to the extent to which they are an aid to us in construing that Statute. We are bound by the construction given to the Statute by the Pennsylvania Courts.

Counsel for the plaintiff rely upon the case of *Miller vs. Reading Co.*, 292 Pa., 44.

Counsel for the defendant rely upon *Gilvary vs. Cuyahoga*, 292 U. S., 57; *Tipton vs. Atchison*, 298 U. S., 141, and a number of Pennsylvania cases. The *Gilvary* and *Tipton* cases are of little help to us. They rule that a State may withhold a common law right of action and substitute for it Workmen's Compensation; whether the State has done so is for the Courts of the State to determine and that the Courts of the United States are bound thereby.

*Venezia vs. Philadelphia Electric*, 317 Pa. 517, may be accepted as illustrative of the Pennsylvania cases cited to us.

These were all domestic cases in which the injured workmen had agreed to accept of the compensation given him by the State Statute, and had a right to it. They settle the law of Pennsylvania to be that when the injured workman has the right to compensation and has agreed to accept it, this is his only remedy.

This reduces the argument in the instant case to a very narrow compass. Here the plaintiff had not agreed to accept compensation, and we do not know that he had the



right to any. He did sustain the relation of employee and employer with the defendant. He is sought to be held however to the provision of the Act because as he did not disclaim agreement he is "conclusively presumed" to have agreed. For ought we know, the contract of employment was made outside of Pennsylvania whose Statutes were unthought of and not binding upon the parties, and the plaintiff had no right to compensation. The Miller case is decisive of this.

We hold that the provisions of the Act do not apply to parties whose contract of employment was entered into outside of the State of Pennsylvania and who have not agreed to pay and accept compensation. The plaintiff does not lose his right of action except only as he has agreed and has been given a substitute right to the compensation provided by the Act. Here he has no right to compensation.

The motion for a new trial and for judgment n. o. v. are both denied, with exception to defendant, and plaintiff may enter judgment on the verdict, with costs.



**X.**

**NOTICE OF APPEAL TO THE CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT**

(Filed July 11, 1939)

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Notice is hereby given that the Central Railroad of New Jersey, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the judgment entered in this action on April 27, 1939, and from the Order of Court denying defendant's motion for judgment n. o. v. filed and entered on June 18, 1939.

AUBREY & FRIEDMAN,  
By: HENRY B. FRIEDMAN,  
*Attorneys for Central Railroad of  
New Jersey.*

Dated: July 10, 1939.

## XI.

STATEMENT OF POINTS TO BE RELIED UPON ON  
APPEAL

(Filed Sept. 23, 1939)

The Central Railroad of New Jersey, the appellant in the above case, by its attorneys, Aubrey & Friedman, Esqs., submits the following statement of points which it intends to rely upon on its appeal to the Circuit Court of Appeals:

1. The lower court erred in denying defendant's motion for a directed verdict at the conclusion of plaintiff's case, for the reason that plaintiff and defendant were not engaged in interstate commerce at the time of the accident.

2. The lower court erred in denying plaintiff's motion for a dismissal of the complaint.

3. The lower court erred in denying defendant's motions for a directed verdict and for binding instructions at the conclusion of the case for the reason that neither plaintiff nor defendant were engaged in interstate commerce at the time of the accident and that plaintiff's recovery, if any, must be under the Pennsylvania Workmen's Compensation Act.

4. The lower court erred in denying defendant's motion for judgment n. o. v. and in entering judgment on the verdict, for the reason that there can be no recovery in this case inasmuch as neither plaintiff nor defendant were engaged in interstate commerce at the time of the accident and any recovery would have to be done under the Pennsylvania Workmen's Compensation Act.

AUBREY & FRIEDMAN,

By: (s) HENRY B. FRIEDMAN,

*Attorneys for Appellant.*

XII.

EXTENSION OF TIME FOR FILING RECORD.

(Filed Aug. 16, 1939)

And now, August 15, 1939, it is agreed between counsel that the time for the filing of the record on appeal and docketing the action shall be and is hereby extended for an additional forty-five (45) days.

AUBREY & FRIEDMAN,  
By: HENRY B. FRIEDMAN,  
*Attorneys for Central Railroad of  
New Jersey.*  
FRED B. GERNERD,  
*Attorney for Plaintiff.*

## XIII.

## STIPULATION AS TO CONTENTS OF RECORD

(Filed Sept. 23, 1939)

It is hereby stipulated and agreed by and between attorneys for appellant and appellee that the transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to the notice of appeal given by appellant, shall include the following and no other papers and exhibits:

1. The Plaintiff's Statement of Claim.
2. The Defendant's Affidavit of Defense.
3. The complete transcript of the testimony, motions, colloquy, and charge of the court made in the trial of the case, except as eliminated by Stipulation between counsel and as heretofore filed.
4. The opinion and order of the court, dated June 8, 1939.
5. The notice of appeal and date of filing.
6. The stipulation and agreement extending the time of appeal and filing of record.
7. ~~Stipulation designating the portions of testimony to be eliminated in the record on appeal.~~
8. Stipulation designating the contents of the record on appeal.
9. Statement of points relied upon on appeal.

(s) HENRY B. FRIEDMAN,

*Attorney for Appellant.*

(s) FRED B. GERNERD,

*Attorney for Appellee.*

September 22, 1939.

XIV.

CLERK'S CERTIFICATE

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*United States of America,  
Eastern District of Pennsylvania, ss:*

I, GEORGE BRODBECK, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of Howard E. Breisch vs. The Central Railroad Company of New Jersey, No. 129, Civil Action, as per stipulation filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 9th day of October, A. D. 1939.

GEORGE BRODBECK,  
*Clerk.*

(Seal)



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[fol. 110] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

And afterwards, to wit, the 6th day of December, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 3d day of June, 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 111] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

Appeal from the District Court of the United States for  
the Eastern District of Pennsylvania

OPINION—Filed June 3, 1940

Before Biggs, Clark and Jones, Circuit Judges

Biggs, Circuit Judge:

—The appellee, Breisch, a citizen of Pennsylvania, was injured while employed as a conductor by the appellant, Central Railroad of New Jersey, a corporation of New Jer-

sey. A freight car which was being shifted towards a scales in the yard of American Steel & Wire Company at Allentown, Pennsylvania, broke loose from the drill engine. The appellee jumped on the car and endeavored to stop it by using the hand brake. The brake was defective and the car collided with another, throwing the appellee to the ground, seriously injuring him. It is conceded that the car upon which the appellee was riding was engaged in a wholly intrastate movement. The appellant railroad is clearly a highway in interstate commerce. There was ample evidence upon which the jury could find that the hand brake was [fol. 112] defective. Judgment was rendered for the appellee in a substantial amount. The appeal at bar followed.

Jurisdiction of the cause is based upon diversity of citizenship, the amount in controversy exceeding \$3,000.

The complaint alleges that the appellant is liable to the appellee by reason of its negligence in hauling a car not equipped with efficient hand brakes as required by the Act of April 14, 1910, c. 160, Sec. 2, 36 Stat. 298 (45 U. S. C. A. 11). See also U. S. C. Title 45, Secs. 12-16 (45 U. S. C. A. 12-16). The appellant contends that the appellee is not entitled to maintain his action under the Safety Appliance Acts and that his sole remedy lies in the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736. See Sections 302 (a) and 303 (77 P. S. 461, 481). The first section referred to provides in part that it shall be conclusively presumed that the parties to a contract of hiring have accepted the provisions of article three of the Act and have agreed to be bound thereby. Section 303 provides that, "Such agreement shall constitute an acceptance of all the provisions of article 3 of this act, and shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death \* \* \*." Article 3 referred to constitutes the elective compensation provisions of the Act. P. L. 736, Art. III, Sec. 301, et seq. (77 P. S. 411, et seq.).

As was made plain by Mr. Justice Roberts in the case of *Tipton v. Atchison Ry. Co.*, 298 U. S. 141, 146-148, the Safety Appliance Acts as now constituted apply to all cars used upon railroads which are highways of interstate commerce and the duty thus imposed necessarily supersedes the duty of the employer at common law. Mr. Justice Roberts went on to state, "But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence,

the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states." The origin and application of a right of action in an employee by reason of breach of the Acts rests in the law of the States. [fol. 113] The negligence charged in the case at bar was the appellant's violation of Section 2 of the Act of April 14, 1910. This, however, is only one of the elements which, like any other act of negligence, will go to support the appellee's right of action. It follows therefore that if the Pennsylvania Workmen's Compensation Act supplies the exclusive remedy of the appellee, he may not maintain the action at bar.

Were we determining as an original question whether the Pennsylvania Workmen's Compensation Law supplies the appellee with his sole remedy, we would conclude that it did so for its terms are entirely unambiguous and clearly seem applicable under the circumstances. This question, however, has been considered by the Supreme Court of Pennsylvania, acting seemingly under a misapprehension of the nature of the decision of the Supreme Court of the United States in the case of *McMahan v. Montour R. Co.*, 270 U. S. 628. In the *McMahan* case in the Supreme Court of Pennsylvania (283 Pa. 274, 276, 128 A. 918) it was held that the remedy for a breach of duty imposed by the Safety Appliance Acts lay in the Pennsylvania Workmen's Compensation Act. The Supreme Court of Pennsylvania held also, however, that the provisions of the Safety Appliance Acts were inapplicable to railroad cars used in intrastate operations of the railroad even though the railroad was a highway of interstate commerce. This is pointed out by Mr. Justice Roberts in the *Tipton* case, p. 148. Due to an apparent misapprehension of the basis of its reversal by the Supreme Court in *McMahan v. Montour R. Co.*, the Supreme Court of Pennsylvania in *Miller v. Reading Company*, 292 Pa. 44, 140 A. 618, held that the claim of an injured employee of an interstate railroad was not cognizable under the State Compensation Act if the employee was injured by reason of a defective appliance upon a car engaged in a purely intrastate movement.

The appellant takes the position that the decision in the *Miller* case is not binding upon us, citing the *Tipton* case, [fol. 114] as authority for his contention. The *Tipton* case deals with a situation closely analogous to that at bar. In the case of *Texas & Pacific Ry. Co. v. Riggsby*, 241 U. S. 33,



the Supreme Court held that the first Safety Appliance Act had been extended by later legislation to cover equipment used in intrastate transportation upon railroads which were highways of interstate commerce. Two District Courts of Appeal of California misinterpreted this decision. In the case of *Walton v. Southern Pacific Co.*, 8 Cal. App. (2nd) 290, 48 P. (2nd) 108, it was held that the right of an injured employee to recover damages sustained by reason of a violation of the Federal Boiler Inspection Act (U. S. C. Tit. 45, Secs. 22-34), applicable as are the Safety Appliance Acts, did not " \* \* \* extend to the field occupied by the Compensation Act of the State of California (2 Deering's General Laws of California, p. 2276-7) and that the employer's contention that the sole remedy of the employee was under the State Compensation Act was untenable. In *Ballard v. Sacramento Northern Ry. Co.*, 126 Cal. App. 486, 14 P. (2nd) 1045, 15 P. (2nd) 793, another District Court of Appeal concluded that the Safety Appliance Acts imposed not only a duty upon the employer, but gave the employee a remedy as well and that to deny him such remedy would be to disregard the provisions of federal law. The Supreme Court of California refused to review either the *Walton* case or the *Ballard* case. The Workmen's Compensation Act of California, though differing somewhat in the language of its provisions from the Pennsylvania Workmen's Compensation Law, none the less is similar in substance upon the point sub judice. In the *Tipton* case Mr. Justice Roberts, referring to *Walton* and *Ballard* cases, stated at p. 151, "If these decisions of intermediate Courts of Appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the [California] Compensation Act as having, by its terms, no application in the circumstances, they are binding authority in federal [fol. 115] courts. If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the Compensation Act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts." Mr. Justice Roberts also stated, p. 152, "If we were convinced that the court acted solely upon a construction of the Workmen's Compensation Law, uninfluenced by the decisions following the supposed authority

of the Rigsby case, we should not hesitate to hold United States courts bound by such construction of the state statute. But the terms of the state Compensation Law, and the California decisions construing it, lead us to doubt that this is so.", and "We are not persuaded that if the state courts had thought that California was free to ordain a plan of workmen's compensation in lieu of an action for damages for breach of the duty imposed by the Safety Appliance Acts they would have restricted the scope of the Workmen's Compensation Act as was done in the Ballard and Walton cases. A definite and authoritative decision that its scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts."

In *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120, the Supreme Court was passing upon a decision of the Court of Appeals of New York which held that the Arbitration Law of New York, enacted April 19, 1920, c. 275, and amended March 1, 1921, c. 14, did not extend to controversies within the admiralty jurisdiction. Mr. Justice Brandeis stated: "But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction but because it thought the Federal Constitution required such action." The Supreme Court thereupon reversed the judgment of the Court of Appeals of New York. See also *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, and *Southern Pacific Co. v. Jensen*, 244 U. S. 205.

We therefore must determine whether the Supreme Court of Pennsylvania in *Miller v. Reading Company* was making a judicial construction of the Pennsylvania Workmen's Compensation Act, its applicability to an employee injured in an accident occurring in Pennsylvania, or was in substance construing the Safety Appliance Acts. The Court stated, pp. 47-48, "But the [Compensation] act, carrying with it a presumption of acceptance of its terms, did not interfere with rights acquired by the congressional legislation, which supersedes the law of the state upon matters within its terms." The Court also stated, p. 48, "The argument is made that, though the Workmen's Compensation Law is inapplicable to a case falling within the scope of the Federal Employers' Liability Law, because then interstate commerce is involved, yet the same is not true where the



accident occurs in an intrastate movement, for in such instances the local legislation must fix the relative rights of the master and servant. Congress has seen fit to provide that certain appliances shall be used by railroads engaged in business between the states, or connected with others furnishing such service, and, for the protection of all, the performance of certain duties is made requisite. Recovery may be had by employees, irrespective of the character of their work at the particular moment of injury, when there has been a violation of the requirements as to the use of safety appliances. These rights of the one injured are not affected by the Workmen's Compensation Act, for the same underlying reasons which led to the conclusion that the Federal Employers' Liability Act may notwithstanding be enforced. *McMahon v. Montour R. R. Co. supra.*"

The Court also stated, "The Act of Congress gave to the employee rights not granted under state laws and our courts have frequently sustained proceedings based on the federal statute in question (*Sims v. P. R. R. Co.*, *supra*, and [fol. 117] cases there cited), and the exercise of this jurisdiction has been approved on appeal to the United States Supreme Court. *McMahon v. Montour R. R. Co.*, *supra*; *Pursglove v. Ry.*, 285 Pa. 27, 131 A. 477, certiorari denied 270 U. S. 654, 46 S. Ct. 352, 70 L. Ed. 783.", and "Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force. It follows that there was power below to entertain the present proceeding."

In the light of the foregoing we must conclude that the Supreme Court of Pennsylvania reached the conclusion that the Compensation Act did not apply to Miller's case, not as a matter of the statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law. The conclusion reached by the Supreme Court of Pennsylvania constitutes an erroneous

construction of federal statutes and is not binding upon us. The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law.

Nor can we see how the Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 52, subsection (4), 46 P. S. Supp. Sec. 552, requires a different conclusion than that which we have expressed. The act referred to provides, "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language". The statute merely states what has been the [fol. 118] common law of Pennsylvania for some time. See *In re Buhl's Estate*, 300 Pa. 29, 150 A. 86. The truth of the matter is the Supreme Court of Pennsylvania erroneously construed the scope of the Federal Safety Appliance Acts in *Miller v. Reading Co.* in 1928. The decision of the Supreme Court of Pennsylvania which was wrong then is still wrong. This might have been unimportant, however, for a decision of the Supreme Court of Pennsylvania when engaged purely in construing a state statute is binding upon us. In the *Miller* case, however, the Supreme Court of Pennsylvania undertook to construe at least to some degree the application of the Safety Appliance Acts. That this is so we think is made clear by that portion of the opinion in *Ross v. Schooley*, 257 F. 290, certiorari denied 249 U. S. 615, quoted by the Supreme Court of Pennsylvania in the *Miller* case. We repeat it here. "It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional right that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employee than of a traveler. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of *Schlemmer v. Buffalo, etc., Ry. Co.*, 205 U. S. 1." The effect of the *Tipton* case was to invalidate such decisions as *Ross v. Schooley*.

thus rendering untenable the premise of *Miller v. Reading Co.*

Moreover this quotation from the *Miller* case becomes peculiarly pertinent in the case at bar when considered in the light of the decision of the Supreme Court of the United States in the recent case of *State Tax Commission v. Van Cott*, 306 U. S. 511, 514. Mr. Justice Black stated in regard [fol. 119] to a decision of the Supreme Court of Utah as follows: "If the court were only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law. Whatever exemptions the Supreme Court of Utah may find in the terms of this statute, its opinion in the present case only indicates that 'it thought the Federal Constitution (as construed by this Court) required' it to hold respondent not taxable." We consider this language peculiarly apposite to the circumstances presented by the case at bar since we think it is apparent that the Supreme Court of Pennsylvania in the *Miller* case decided that case upon the assumption that the State of Pennsylvania did not have the power to deny to the injured employee an action at law and make his remedy under the Pennsylvania Workmen's Compensation Act an exclusive remedy.\*

Accordingly, the judgment of the court below is reversed and the cause is remanded with directions to enter judgment for the appellant.

[fol. 120] JONES, Circuit Judge, dissenting.

I should affirm the judgment for the plaintiff.

The facts of the case are fully and fairly stated in the majority opinion. Further recital is therefore unnecessary. Also, there is no disagreement that the plaintiff's

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\* Cf. 49 Harvard Law Review 456-461; 21 Minnesota Law Review 336-338.



right of action, whatever it may be, depends both in its origin and regulation upon the law of Pennsylvania which governs the rights of the parties. The question is simply as to what constitutes the pertinent law of that state binding upon a federal court.

In circumstances similar in all material respects to those attending the employment of and injury to the plaintiff in the instant case, the Supreme Court of Pennsylvania has held that the injured employee's right of action against his employer for damages for the latter's negligence in the particular circumstances remains in full force and is not superseded by the Workmen's Compensation Law of the State. *Miller v. Reading Company*, 292 Pa. 44. The majority of this court conclude, however, that the decision of the Supreme Court of Pennsylvania in the *Miller* case "constitutes an erroneous construction of federal statutes and is not binding upon us". Thus free to ascertain and declare the law of the state independently, the majority hold that "The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law."

The resultant impasse due to these conflicting conclusions constitutes a very effective barrier to the plaintiff. Until the state rule in the *Miller* case is changed by competent state authority, the plaintiff's claim is not cognizable under the compensation law. Moreover, the year within which such a claim must be filed has long since passed; and, the time for filing a compensation claim is not a mere limitation of action but goes to the jurisdiction of the Compensation Board. Act of June 2, 1915, P. L. 736, as amended, 77 P. S. Supp. 602. *Demmel v. Dilworth*, 136 Pa. Superior Ct. 37. See also *Guy v. Stoecklein* [fol. 121] *Baking Co.*, 133 Pa. Superior Ct. 38. While the litigant's failure to pursue his rights timely in the appropriate forum will not be permitted to clothe him with a right which he would not otherwise possess, before we fault the plaintiff for his choice of action or forum, we should make certain that his choice was wrong. Of that, I am by no means convinced, hence, this dissent.

The jurisdiction of the district court does not rest upon a federally conferred right or remedy but was invoked upon the ground of diversity of citizenship with the requisite amount in controversy. The statement of claim plainly discloses that the plaintiff was under no misapprehension

that the Federal Safety Appliance Acts gave him any right of action or that the appellant's breach of the duty which those Acts impose constituted any more than evidence of the employer's negligence. The plaintiff sought federal court jurisdiction for the enforcement of an existing right recognized by the applicable local law. However, as a result of the decision now arrived at by the majority, the plaintiff finds himself without legal means for the redress of a serious injury which he admittedly suffered in the course of his employment through the established negligence of his employer. The jury's verdict concluded the facts in the plaintiff's favor; and no substantial trial error is assigned with respect to the issues of fact.

The majority assert reliance upon the ruling of the Supreme Court in *Tipton v. Atchison, Topeka & Santa Fe Ry. Co.*, 298 U. S. 141. In so doing, it seems to me that the *Tipton* case is applied to a situation to which that decision is not germane by its own intendment.

In the *Tipton* case, the Supreme Court rejected, as not being declaratory of the law of California, two decisions by state courts of intermediate appeal, reviews having been refused by the Supreme Court of the state. The reason for the rejection of the California court decisions in the *Tipton* case was because the state courts, instead of construing the California compensation statute as having [fol. 122] excluded from its purview the claims there involved, erroneously construed federal statutes (Safety Appliance Acts in the one case and Boiler Inspection Act in the other) as affording "a remedy in the nature of an action for damages" which the state statute could not competently supersede. This, of course, was error. While the Safety Appliance Acts do afford an injured employee a ground for complaint for their violation, which he would not otherwise have, they neither provide nor require a remedy for the cause but leave the matter of the remedy to the regulation of the states.

I apprehend the rule to be that, where a state court excludes a claim from the operation of a state statute upon the mistaken notion that a federal statute affords a remedy for the claim, the state decision is not binding upon a federal court, but that, where the state court's exclusion of the claim from the state statute proceeds from that court's interpretation of the legislative intent with respect to the scope of the state statute, the decision in such in-



stance is binding upon a federal court as the decision of a competent state court declaratory of pertinent local law. The thing of importance in the particular circumstances is how the state court arrives at its exclusion of the employee's claim from the state compensation statute. Support for this view, I believe, is to be found not only in the Tipton case but also in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120.

After reviewing the two California decisions which were rejected in the Tipton case, Mr. Justice Roberts speaking for the Supreme Court, said at p. 151,—

“If these decisions of intermediate courts of appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in federal [fol. 123] courts. If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the compensation act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts.”

And, in *Red Cross Line v. Atlantic Fruit Co.*, supra, where a New York Arbitration Act was invoked for the arbitrament of a claim arising under a maritime contract, the contention was advanced that such controversies are within the exclusive jurisdiction of the admiralty courts under the Federal Constitution and the Judicial Code. Accordingly, the New York Court of Appeals, adopting this view, dismissed the arbitration proceeding. In reversing the judgment of the Court of Appeals, Mr. Justice Brandeis, for the Supreme Court, states the argument and the answer at p. 120, as follows,—

“The argument is that the Court of Appeals held, as a matter of statutory construction, that the Arbitration Law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable. \* \* \* If that court had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction,

the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented."

What was thus clearly denominated in the Red Cross Line case as being binding upon a federal court is what I take to be the effect of the decision of the Pennsylvania Supreme Court in the Miller case where the latter court held at, p. 50, that,—

[fol. 124] "Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, expressed or implied, it was agreed should be so disposed of, and as to such cases, jurisdiction of the courts to try and determine is ousted. *But as to demands, not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force.*" (Emphasis supplied.)

As the claim in the Miller case arose out of the employer's violation of a duty to its employee which was not incident to "the ordinary relationship of employer and employee", the apparent intent of the state court decision was to exclude the claim from the provisions of the compensation act as not being within the purview of that statute as written. The effect of the state decision is that the legislature, by implying from the acquiescence of the parties a contract for compensation which is presumed from their failure to renounce formally the provisions of the compensation act,<sup>1</sup> did not thereby embrace within such implied contracts claims not arising "from the ordinary relationship of employer and employee", as known to the law of the state; and that, to do so, would require a clearly expressed intent to that end on the part of the legislature. This conclusion of the state court amounts to a judicial interpretation of the legislative intent with respect to the scope of the compensation act and, as such, constitutes a construction of the state statute.

The action of the state court in such regard was the exercise of a power peculiarly within the competency of

<sup>1</sup> Act of June 2, 1915, P. L. 736, 738, 739, Art. III, Secs. 301 and 302, 77 P. S. §§ 431, 461.

that court,—a power which it exercised in a somewhat similar manner in its construction of the compensation act with respect to a minor's right of action against his employer for damages. As originally written, Art. III, Sec. [fol. 125] 302, of the act provided, *inter-alia*, that "In the employment of minors, article three [the elective compensation provision] shall be presumed to apply, unless the said written notice [renouncing compensation] be given by or to the parent or guardian of the minor".<sup>2</sup> Notwithstanding the sweep of this statutory provision, the Supreme Court of the state ruled that a minor employee's action of trespass for his employer's negligence was not superseded by the compensation act where the minor was employed in violation of a state statute. *Lincoln v. National Tube Co.*, 268 Pa. 504, 506. See also *King et ux. v. Darlington Brick & Mining Co.*, 284 Pa. 277. Later, the legislature by amendment expressly brought the claims of illegally employed minors within the compensation act as we shall see.

The Miller case was decided in 1928. Since then the compensation act has been amended a number of times but at no time has the legislature seen fit to repudiate the intention imputed to it by the state court in the Miller case. In 1937 comprehensive and important amendments of the compensation law were enacted.<sup>3</sup> While the legislature then expressly offset or changed existing law under prior court decisions with respect to the act, and notably the rule as to minors under the decisions above cited,<sup>4</sup> nothing was done to bring within the compensation law the claims of intrastate employees for injuries received through the employer's violation of the Federal Safety Appliance Acts.

Furthermore, legislative confirmation of the intended scope of the compensation law, as limited by the State Supreme Court in the Miller case, does not rest merely upon the implication of fact. It is implied by positive law.

<sup>2</sup> Act of June 2, 1915, P. L. 736, 739, Art. III, Sec. 302, 77 P. S. § 461.

<sup>3</sup> Amendment of June 4, 1937, P. L. 1552, Sec. 1, etc., 77 P. S., p. 3 et seq.

<sup>4</sup> See the amendments of June 4, 1937, P. L. 1552, § 1, 77 P. S. §§ 28 and 421, whereby the right to contract for compensation and to file a claim is expressly conferred upon a minor even though the employment is in violation of a state statute.

Thus, at the same 1937 session, and prior to the amendments to which reference has just been made, the Pennsylvania legislature enacted a statute prescribing rules for [fol. 126] statutory construction wherein it is provided "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language".<sup>5</sup> What therefore had been the legislative intent in the prior compensation act, as judicially construed, became by statutory adoption the legislative intent with respect to the amended compensation act in its unchanged provisions. Whether the Statutory Construction Act represents a valid exercise of legislative power, we need not inquire. Nor is it of importance that the rule thus statutorily promulgated had been a canon of construction judicially followed in Pennsylvania antecedently. The Statutory Construction Act of 1937 evidences none the less an expression by the legislature of its intended acceptance of the construction of the compensation law by the State Supreme Court with respect to the pertinent statutory provisions which were later reenacted by amendment without material change.<sup>6</sup> The point here made is simply as to the evident legislative intent.

Concededly, the power to say whether claims of intra-state employees for damages due to their employers' violation of the Federal Safety Appliance Acts shall come under the state compensation law lies with the state legislature. The Safety Appliance Acts "leave the genesis and regulation . . . [of an employee's right of action for their breach] to the law of the states". Tipton case at pp. 147 and 148. When, therefore, the Pennsylvania legislature studiously refrained from subjecting such claims to the compensation law by the later amendments to which the legislative intent, as construed in the Miller case, is directly imputed by the legislature through the express medium of the Statutory Construction Act, it seems to me that the

<sup>5</sup> Act of May 28, 1937, P. L. 1049, Art. IV, Sec. 52, subsection (4), 46 P. S. Supp. § 552.

<sup>6</sup> Compare Secs. 301 and 302 of the Act of June 2, 1915, P. L. 736, 738, 739, with the cognate provisions in the compensation act after the amendment of June 4, 1937, P. L. 1552, Sec. 1, 77 P. S. §§ 431 and 461.



[fol. 127] law of the state is thus determined. And, after all, the legislative intent; when once discovered, controls. In *State Tax Commission v. VanCott*, 306 U. S. 511, cited by the majority, it does not appear that there was subsequent action by the Utah legislature in apparent confirmation of the state court decision as there was in the instant case by the Pennsylvania legislature following the decision in the *Miller* case. Hence, the question which this appeal presents was not involved in the *VanCott* case.

It is true, as the majority of this court point out, the opinion of the Pennsylvania Supreme Court in the *Miller* case contains statements which indicate that that court thought that the Federal Safety Appliance Acts imply an employee's right of action for their breach which it is the duty of the states to supply or recognize by way of an action at law for damages. While these considerations would have been highly important in other circumstances, they seem to me to be no longer material in view of the action of the legislature, subsequent to the decision in the *Miller* case, particularly when contrasted with its positive action with respect to the claims of illegally employed minors. Whether or not the Pennsylvania court so mistakenly conceived the effect and requirements of the Safety Appliance Acts, it is none the less true that the *Miller* case contained what amounted to an independent construction of the state statute, which by reason of subsequent legislative confirmation became the more definite and authoritative. And, it was said in the *Tipton* case at p. 155 that,—

“A definite and authoritative decision that its [the compensation act's] scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts.”

So bound by the law of the state, we should affirm the judgment for the plaintiff. Further changes in the compensation law are appropriately matter for legislative action whereof all persons will be duly advised and thenceforth bound. In such circumstances, claimants will not find, after pursuing a supposed right under state law, that they have been litigating upon the horns of a dilemma by which they have been impaled.”

A true Copy:

Teste: — — —, Clerk of the United States Circuit Court of Appeals for the Third Circuit.



[fol. 129] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT

October Term, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

On appeal from the District Court of the United States, for  
the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record  
from the District Court of the United States, for the Eastern  
District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and  
adjudged by this Court that the judgment of the said Dis-  
trict Court in this case be, and the same is hereby reversed,  
with costs, and the cause is remanded to the said District  
Court with directions to enter judgment for the appellant.

Philadelphia, June 3, 1940.

— John Biggs, Jr., Circuit Judge.

[Endorsements:] Order Reversing Judgment etc. Re-  
ceived & Filed Jun. 3, 1940. William P. Rowland, Clerk.

[fol. 130] UNITED STATES OF AMERICA, EASTERN DISTRICT OF  
PENNSYLVANIA, THIRD JUDICIAL CIRCUIT, Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit  
Court of Appeals for the Third Circuit do hereby certify  
the foregoing to be a true and faithful copy of the original  
Transcript of Record and proceedings in this court in the  
case of Central Railroad Company of New Jersey, Defend-  
ant-Appellant, vs. Howard E. Breisch, Plaintiff-Appellee,  
No. 7179 on file, and now remaining among the records of  
the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my  
name and affixed the seal of the said Court, at Philadelphia,  
this 20th day of August in the year of our Lord one thousand  
nine hundred and forty and of the Independence of the  
United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of  
Appeals, Third Circuit. (Seal.)

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1741)